CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 108.

T. A. GRAHAM, COUNTY AUDITOR FOR GREENWOOD COUNTY, AND J. A. MARSHALL, COUNTY TREASURER OF GREENWOOD COUNTY, SOUTH CAROLINA, PLAINTIFFS IN ERROR,

vs.

S. ELLEN FOLSOM, JENNIE F. PECK, AND NANNIE F. McCANLESS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

FILED OCTOBER 13, 1904.

(19,493.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 19, 1905.

1 Transcript of Record.

Caption.

THE UNITED STATES OF AMERICA, District of South Carolina, } *To wit:*

In the Circuit Court, Fourth Circuit. At Law.

At a circuit court of the United States for the district of South Carolina, held in the city of Asheville, North Carolina, on the nineteenth day of July, A. D., 1904, before the Honorable J. C. Pritchard, United States circuit judge for the fourth judicial circuit, the following proceedings were had, to-wit:

Ex Parte S. ELLEN FOLSOM, JENNIE F. PECK, and NANNIE F. MCCANLESS.

In re GEORGE W. FOLSOM, Plaintiff,
versus
TOWNSHIP OF NINETY-SIX, Defendant.

2 Petition for Writ of Mandamus.

Filed June 23, 1904.

UNITED STATES OF AMERICA, District of South Carolina.

In the Circuit Court, Fourth Circuit.

Ex Parte S. ELLEN FOLSOM, JENNIE F. PECK, and NANNIE F. MCCANLESS.

In re GEORGE W. FOLSOM, Plaintiff,
against
TOWNSHIP OF NINETY-SIX, Defendant.

To the honorable the judges of said court:

The petition of the above named petitioners respectfully shows:

1. That George W. Folsom, the plaintiff in the above entitled cause was a citizen and resident of the State of Tennessee, and the defendant a territorial division of the State of South Carolina, situate formerly in the county of Abbeville, but now included within the county of Greenwood under and by virtue of the laws of said State, and was incorporated under an act of the General Assembly entitled "An act to charter the Greenville and Port Royal Railroad

Company" approved Dec. 23, 1882, amended on December 24, 1885 by an act entitled "An act to amend an act entitled 'An act to charter the Greenville and Port Royal Railroad Company.'"

2. That on February 10, 1893, the said George W. Folsom brought his action in this honorable court entitled "George W. Folsom against Township of Ninety-six in the County of Abbeville, S. C., al-
leging among other things that the defendant, through its corporate agents, had on March 25, 1886, duly executed and issued
3 bonds of said township aggregating twenty-eight thousand dollars, with attached interest coupons at the rate of seven per cent. per annum, and of the denominations specified in said bonds, and that said George W. Folsom had purchased certain of said past due coupons clipped therefrom, amounting in the aggregate to the sum of five thousand one hundred and ten dollars, being specifically set forth in said complaint, and alleging that no part of said coupons had been paid, and that defendant and its agents had refused and neglected to collect said taxes for the payment of said coupons and interest, and demanding judgment to the amount of said coupons, together with interest thereon, and for the costs of said action, and for the issue of a writ of mandamus directed to the proper officers to levy and collect taxes to pay said coupons.

3. That said action being pending, a verdict was rendered in favor of the plaintiff for the sum of seven thousand one hundred and eighteen and 78/100 dollars and for one hundred, ninety-three and 15/100 dollars, on August 14, 1896. The judgment was duly entered thereon and execution issued on August 28, 1896, and the same was lodged in the office of the marshal for said district, but said execution has been returned wholly unsatisfied, and no part of the said judgment has been paid, and the full amount is now due and payable.

4. That by the act of the legislature under which said bonds were issued, it was provided:

"SEC. 9. That for the payment of the interest on such bonds as may be issued by said counties, cities, towns or townships, the county auditor or other officer discharging such duties, or the city or town treasurer, as the case may be, shall be authorized and required to assess annually upon the property of the said county, city, town or township, such per centum as may be necessary to pay the said interest of said sum of money subscribed, which shall be known and styled in the tax books as said railroad tax, which shall be col-
4 lected by the treasurer under the same regulations as are provided by law for the collection of taxes in any of the counties, cities, towns or townships so subscribing, and which shall be paid over by the treasurer to the holders of said bonds as the said interest shall become due on presentation of the coupons, etc."

5. That at the time of the execution of the said bonds, said township was situate in Abbeville county, but that thereafter, to wit, in the year 1896, the county of Greenwood was organized in pursuance of the laws of said State, out of portions of Abbeville and Edgefield

counties, and the township of Ninety-six was included in the county of Greenwood.

6. That demand has been made upon the proper officers of Greenwood county to assess and collect taxes for the payment of said judgment, but said officers have neglected and failed to make such assessment.

7. That since said bonds have been executed, the legislature of said State has passed several acts forbidding under heavy penalty the levy and collection of taxes for the payment of said township bonds.

8. That said acts are in violation of section 10 of article 1 of the Constitution of the United States of America, but the officers charged with the duty of levying and collecting taxes to pay said bonds have obeyed the mandate in said acts and have failed to assess or collect taxes. That petitioner is advised and believes that any further effort to procure voluntary action on the part of said officers would be idle and without effect. That the auditor for Greenwood county is T. A. Graham, and the treasurer for said county is J. A. Marshall.

9. That petitioners are now the owners of said judgment, and all moneys due thereon are payable to them.

Wherefore your petitioners pray:

1. That a writ of mandamus be issued directed to said auditor and said treasurer directing and demanding the said auditor to assess upon all property of said township a sufficient per centum to pay said judgment with costs, and commanding the treasurer of said county to collect the taxes so assessed and pay over the same upon the said judgment until the same be wholly satisfied.

2. For the costs of this proceeding, and for such other and further relief as in the premises may be just.

SHIELDS & MOUNTCASTLE,
HAYNSWORTH & PARKER,
Petitioner's Attorneys.

June 21st, 1904.

STATE OF NORTH CAROLINA, }
County of Buncombe. }

Personally appeared before me H. J. Haynsworth, who being duly sworn, says that he is one of the attorneys for the petitioner herein; That the foregoing petition is true of his own knowledge except as to matters therein stated upon information and belief, and as to those matters he believes it to be true.

H. J. HAYNSWORTH.

Sworn to before me this 21st, day of June 1904.

[SEAL.]

W. S. HYAMS,
Clerk U. S. Circuit Court.

6

Rule to Show Cause.

Filed 23 June, 1904.

UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court Fourth Circuit.

Ex Parte S. ELLEN FOLSOM, JENNIE F. PECK, and FANNIE McCANLESS.

In re GEORGE W. FOLSOM, Plaintiff,
against
TOWNSHIP OF NINETY-SIX, Defendant.

On reading the verified petition of the plaintiffs herein, and o motion of Shields & Mountcastle and Haynsworth & Parker, a torneys for the petitioner,

It is ordered that T. A. Graham, auditor for Greenwood count and J. A. Marshall, treasurer for Saluda county, do show cause b fore me at Asheville, N. C., on July 11th, 1904, at 11 a. m., o'cloc why the writ of mandamus as prayed for should not issue com manding the said auditor and his successors in office to assess upo all the property in the township of Cooper a sufficient per centu to pay the judgment of the petitioner, and commanding the sai treasurer and his successors in office to collect the tax so assessed and pay over the same upon said judgment and continue so to d until said judgment be wholly satisfied.

Let a copy of said petition be served with this order.

J. C. PRITCHARD,
U. S. Circuit Judge.

June 21st, 1904.

7

Marshal's Return of Service.

UNITED STATES OF AMERICA,
District of South Carolina, *ss:*

I hereby certify and return that I served the annexed petition and rule on T. A. Graham known to me to be the auditor of Green- wood county, and also on J. A. Marshall known to me to be the treasurer of Greenwood county, by handing to and leaving a true and correct copy thereof with them personally, J. A. Marshall on the 24th, day of June, 1904, and T. A. Graham on the 25th, day of June, 1904, at Greenwood in said district.

J. DUNCAN ADAMS,
U. S. Marshal,
By A. B. ELLIS, JR., Deputy.

8 Return.

Filed August 1, 1904.

UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit.

Ex Parte S. ELLEN FOLSOM, JENNIE F. PECK, and FANNIE F. MCCANLESS.

In re GEORGE W. FOLSOM, Plaintiff,
vs.
TOWNSHIP OF NINETY-SIX, Defendant.

To the honorable judges of said court:

T. A. Graham, as auditor of the county of Greenwood, and J. A. Marshall, as treasurer for the same county, for return to the rule to show cause before his honor, J. C. Pritchard, circuit judge, why the writ of mandamus should not issue requiring these respondents respectively to assess and collect a tax as prayed for by the petition in the cause why such a writ should not issue before this court, respectfully sho-:

1. That the respondents admit the allegations of paragraph 1 except the allegations thereof which allege that Ninety-six township is a sub-division of the State of South Carolina and is now included in Greenwood county which allegation is denied.

2. That respondents deny any knowledge or information sufficient to form a belief as to the matters contained in paragraph 2 of the said petition.

3. That neither of said respondents have knowledge or information sufficient to form a belief as to the allegations of paragraph 3 of the said petition and deny any knowledge or information
9 sufficient to form a belief as to the allegations of said paragraph 3 and require a strict proof of the same.

4. Respondents admit the allegations of paragraph 4 of the petition.

5. Respondents admit the allegations of paragraph 5 except they allege that Greenwood county was formed in 1897 under the provisions of the constitution of 1895.

6. Respondent T. A. Graham admits demand upon him to assess said tax and that he refused to do so and alleges that he had no power so to do.

7. Respondents admit the allegations of paragraph 7 of the petition.

8. Respondents admit the allegations of paragraph 8 of the petition except the allegations that allege that said acts are in violation

of the Constitution of the United States of America which allegation is denied.

9. That these respondents further show and submit that neither of them is an officer of the county of Greenwood nor the agent under the law of the State of South Carolina of either the holders of township bonds or the townships themselves. They are officers of the State of South Carolina, appointed by the governor of the said State under the provisions of law and although termed county officers are so styled because assigned to duty in that county and they, therefore, submit that they cannot exercise any function of these respective offices except as authorized by the laws of the said State.

10. That the General Assembly of the said State by its act, approved on the -- day of ——, 190–, and now of force, has forbidden the respondents and all other like officers to assess or collect a tax for the payment of subscriptions by townships to the building of railroads which have not been built.

11. That the railroad, for the building and construction of which, the bonds alleged in the said petition to have been issued, has not been built.

12. That the township of Ninety-six, described in the said petition, does not exist as a corporation, because by an amendment of the constitution of the State of South Carolina, voted by the people in the year 1902 and adopted by the General Assembly of the said State in the year 1903, the corporate existence of the said township was destroyed and all offices in said township abolished and all corporate agents removed long prior to the petition herein.

13. That the said township of Ninety-six never owned any property whatever; that it never had any officers or agents of its affairs with the single exception that the county commissioners of the county of Abbeville were authorized to hold an election for the subscription of bonds described in the petition and to issue bonds for the amount to be subscribed.

14. That respondents are officers under and by virtue of the provisions of the constitution of 1895 and the law pursuant thereto which fixes and determines their duties and power and under the terms and provisions of the said constitution and the acts of the legislature pursuant thereto, these respondents are without power to levy or collect any tax for the purpose set out in the said petition and are forbidden by the express terms of the said constitution from so doing under which said constitution they hold their appointment as officers of the State of South Carolina; that these respondents are required to give a heavy bond conditioned to faithfully discharge and perform the duties of their office in accordance with the requirements of the law of their appointment, which prohibits and forbids doing the acts mentioned in the petition herein.

15. The respondents further submit that section 9 of the act incorporating Ninety-six township does not make it the duty of the county auditor and county treasurer to assess and collect any tax

whatever. It provides, in plain terms, that the said auditor
11 and treasurer shall be authorized and required to assess and collect a certain tax mentioned therein on the property owned by the township and it makes no provision whatever for an assessment of the property or fixing the valuation for taxation of any property within the said territory and could not so provide, this matter being regulated and fixed by the constitution of 1868 which makes it incumbent on the legislature to provide a regular way applicable alike to all counties for said purpose.

16. That at the time the bonds and coupons mentioned in the petition herein are alleged to have been issued, the township of Ninety-six was a territorial sub-division of the county of Abbeville and whatever duty was imposed on the county auditor and treasurer had reference entirely to those officers acting for Abbeville county and Abbeville county is still in existence and still has a county auditor and county treasurer; that the respondents are the county auditor and county treasurer respectively for Greenwood county which was formed under the provisions of the constitution of 1895 and acts of the legislature of 1897 and they are not officers or agents of Ninety-six township for any purpose whatever and are not officers or agents of the holders of the said bonds or judgment mentioned in the petition and have no desire to act as such officers or agents; that they can and do exercise the duties of county auditor and county treasurer respectively in compliance with the law of the State under which they were appointed and commissioned without reference to any duty or obligation of what was known as Ninety-six township as a township and in accepting the office of county auditor and county treasurer they did so under the laws then in existence and of force and afterwards to be enacted, fixing their duties and defining their power and not as officers or agents of the said township which position each of them declined to accept and exercise."

Wherefore, because it is doubtful that the petitioner ever
12 obtained the alleged judgment and because it is impossible for the respondents to determine what property is subject to taxation on account of the demand alleged to be in judgment, and because the respondents do not possess or control any property ever belonging to the said township, and because the said county of Greenwood never succeeded to any right to property of the said township, and because the collection of the taxes prayed for is beyond the scope of authority and duty of the respondents, and because the said respondents cannot, under the law of their appointment, comply with the writ without violating their oath of office and the law appointing them, and because the Township of Ninety-six has no corporate existence, agents or officers, and for the other good and sufficient reasons shown herein, they pray that the said rule be discharged.

J. B. PARK,
F. BARRON GRIER,
Att'ys for Respondents.

STATE OF SOUTH CAROLINA,
County of Greenwood.

Personally comes before me T. A. Graham and J. A. Marshall, who being duly sworn each for himself and not one for the other, says: That the allegations of the foregoing return are true of his own knowledge except the allegations contained in paragraphs 9, 13, & 15, and as to those he believes the same to be true.

T. A. GRAHAM, Auditor.
J. A. MARSHALL, Treasurer.

Sworn to before me this 9th day of July 1904.
[SEAL.] W. G. CALHOUN, N. P. S. C.

13 Opinion and Order Directing Mandamus to Issue.

Filed August 3, 1904.

UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit. At Law.

Ex Parte S. ELLEN FOLSOM, JENNIE F. PECK, and NANNIE F. MCCANLESS.

In re GEORGE W. FOLSOM, Plaintiff,
against
TOWNSHIP OF NINETY-SIX, Defendant.

Shields & Montcastle and H. J. Haynsworth, attorneys for petitioners.

J. B. Park and F. B. Grier, attorneys for respondents.

This is an application for a writ of mandamus to compel the auditor and treasurer of the county of Greenwood to assess and collect a judgment recovered against the Township of Ninety-six for certain bonds issued by it in aid of a railroad company. By an act of 1882, the legislature of South Carolina chartered the Greenville and Port Royal Railroad Company. Section 6 and 8 of this act authorized cities, towns, townships and counties interested in the construction of railroads to subscribe to the capital stock of said railroad company and to issue bonds in payment thereof. Section 9, as a means of paying the bonds provided as follows:

"That for the payment of interest on such bonds as may be issued by the said counties, cities, towns or townships, the county auditor or other officer discharging such duties, or the city or town treasurer, as the case may be, shall be authorized and required to assess annu-

ally upon the property of such city, town, county or township
14 such per centum as may be necessary to pay said interest of said sum of money subscribed, which shall be known and styled in the tax book as said railroad tax, which shall be collected by the treasurer under the same regulations as are provided by law for the collection of taxes in any counties, cities, towns or townships so subscribing and which shall be paid over by the said treasurer to the holders of said bonds as the said interest shall become due, on presentation of the coupons, which said coupons shall be reported to the county commissioners by the said treasurer, or to the council of any city or town where there are coupons from bonds of such city, or town, and all said coupons shall be cancelled by the county treasurer as soon as they are paid by them."

In 1885, an amendatory act was passed in which the name of the railroad company was changed and other alterations and changes were made which do not concern the question at issue in this case. This act also amended the act of 1882, by adding the following provision to section nine:

"That for the purpose of this act, all the counties and the townships in said counties, along the line of the said railroad, or which are interested in the construction as herein provided for, shall be, and they are hereby declared to be bodies politic and corporate, and vested with the necessary powers to carry out the provisions of this act; and shall have all the rights and be subject to all the liabilities in respect to any rights or causes of action growing out of the provisions of this act, The county commissioners of the respective counties are declared to be the corporate agents of the counties or townships so incorporated and situate within the limits of the said counties."

This provision designates the county commissioners of the respective counties as the corporate agents of the counties and townships so incorporated and clothes them with power to issue bonds in such amounts as may be authorized by the voters of the respective territories in the manner therein prescribed.

In accordance with the provisions of this section the people of the township at an election held for that purpose, declared in favor of the issue of bonds in aid of the construction of the railroad and the county commissioners of Abbeville county in the spring of 1886, under the authority conferred upon them by the legislature issued the bonds of the township in the amounts stated in the petition.

These bonds were sold to innocent purchasers for value and for two years the taxes were regularly assessed and collected, and the interest upon the bonds was promptly paid.

In November 1888, the supreme court of South Carolina in the case of Floyd *v.* Perrin, reported in 30 S. C. Reports at page 1, held that under the statutes of 1882 and 1885 the Township of Ninety-six
15 was created a corporation but without any corporate purpose and that the section of the act which undertook to authorize

the issue of bonds was unconstitutional and the township bonds were invalid.

For ten years prior to this decision a number of similar acts had been passed by the legislature of the State in pursuance of which township bonds were issued in aid of railroads and placed upon the market and until the decision in the case *supra* there had been no question or doubt as to the validity of these bonds. At the next session of the legislature an act was passed declaring that when the railroad had been completed through the township, the township bonds issued in aid thereof should be paid by taxation as provided in the original act.

20 Statutes of S. C. page 12.

This statute was held to be constitutional and that a mandamus could be issued by that court to compel the collection of this tax.

State *v.* Whitesides, 30 S. C. 379;
State *v.* Harper, 30 S. C. 586;
State *v.* Neely 30 S. C. 587.

The decisions in these cases practically settled the question in so far as the townships were concerned through which the railroads had been completed, and the interest was paid without further contest. On the other hand, the bonds of the townships through which the railroad had not been completed were not paid.

On the 10th day of February, 1893, George W. Folsom brought suit against Ninety-six township upon certain coupons clipped from its bonds. A demurrer was filed in behalf of the township and Judge Simonton, in an opinion dated December 27th, 1893, sustained the demurrer and dismissed the complaint. This case was carried to the circuit court of appeals and that court certified certain questions of law to the Supreme Court of the United States. The Supreme Court in the fall of 1885, rendered a decision, which is reported in 159 U. S. at page 611, in which it is held that the decision in Floyd *v.* Perrin, having been rendered subsequently to the issue of the bonds in question was not binding on the Federal courts, and considering the question upon its merits the court held the statute was constitutional and the bonds were valid unless there was some other defense. The demurrer was overruled and the defendant was allowed to file an answer. When the case came on for trial
16 in the circuit court it resulted in a verdict for the plaintiff. The case was carried to the circuit court of appeals and the judgment below was affirmed.

Ninety-six Township *v.* Folsom, 30 S. C. 657.

In the meantime other cases had been instituted against various townships and judgment was obtained against the township in each case. A writ of error was sued out in one of them and the judgment below was affirmed.

Dunklin Township *v.* Wells, 30 S. C. 593.

These decisions terminated the litigation of this class of cases on the merits. In 1897 and 1899, acts were passed by the legislature forbidding township commissioners, county commissioners, and all other officers from assessing any tax to pay these bonds and forbidding the county treasurer and all other officers from collecting such tax.

22 St. S. C. 534.
23 St. S. C. 788.

After these statutes were enacted the auditor and treasurer declined to levy and collect the taxes as required by the statutes of 1882–1885, and the plaintiff in one of the cases filed a petition for a writ of mandamus.

Judge Simonton, who delivered the opinion in Hicks *v.* Cleveland, 45 C. C. A. 429, among other things said:

"The purpose of the General Assembly in passing the act to amend the charter of the Greenville & Port Royal Railroad Company, approved December 24th, 1885, (19 Stat. at Lg. S. C. p. 237) was to promote the construction of that road, to accomplish this, it authorized and encouraged townships along the proposed line of road to subscribe bonds towards this construction. In order to give character and credit to these bonds, and to induce the public to invest in them, the 9th section of the act provides a careful, full and sure mode of providing for the interest. And an amendment to the same charter made in 1887, provided (19 St. at Lg. S. C. p. 921) in the same way for the payment of the principal by taxation. These provisions of the act went into, and formed a part of, the contract moving to the bondholders, who invested their money trusting
17 to the provisions. The contract could not be impaired by any subsequent act on the part of the State of South Carolina."

In this opinion Judge Simonton, held that the acts of the legislature which undertook to prevent the collection of the taxes in accordance with the provisions of section nine of the acts of 1882–1885, were unconstitutional and the judgment of the lower court directing the issuance of the writ of mandamus was affirmed. In the fall of 1891, an application was filed in the supreme court of South Carolina in behalf of certain taxpayers in the township of Dunklin, in which that court was asked to enjoin the county auditor and treasurer from levying and collecting the tax to pay the judgment which had been rendered. That court on the 16th day of April, 1892, rendered its decision in which it was held that a mandamus was in the nature of an execution to enforce a judgment of the Federal court and, among other things, it declared this "was an end of the argument, as it cannot be contended that a State court can enjoin any process of a Federal court."

McCullough *v.* Hicks, 63 S. C. 542.

Section 11 of article 7, of the constitution of 1895, provided:

"Each of the several townships of this State, with names and

boundaries as now established by law, shall constitute a body politi and corporate, but this act shall not prevent the General Assembl from organizing other townships or changing the boundaries o those already established; and the General Assembly may provid such system of township government as it shall think proper in an and all the counties, and may make special provision for municipa government and for the protection of chartered rights and powers o municipalities."

The following amendment to this section was proposed by a con current resolution of the legislature of February 28th, 1902:

"That this section shall not apply to the following townships in the following counties: Dunklin and Oaklawn in the county of Greenville; the townships of Cokesbury, Ninety-six and Cooper in the county of Greenwood; Sullivan in the county of Laurens Huitt and Pine Grove in the county of Saluda. The corporate existence of the said townships be, and the same is hereby destroyed, and all officers in said townships are abolished and all corporate agents removed."

23 Statutes of S. C. p. 1227.

This amendment was voted upon favorably at a general election held in November, 1902, and in February, 1903, was adopted by the General Assembly by a concurrent resolution. Thus it became a part of the constitution of South Carolina.

18 The petition upon which the writ of mandamus is based is as follows:

"That George W. Folsom, the plaintiff in the above entitled cause was a citizen and resident of the State of Tennessee, and the defendant a territorial division of the State of South Carolina, situate formerly in the county of Abbeville, but now included within the county of Greenwood under and by virtue of the laws of said State, and was incorporated under an act of the General Assembly entitled "An act to charter the Greenville & Port Royal Railroad Company" approved December 23, 1882, amended on December 24th, 1885, by an act entitled "An act to amend an act entitled" An act to charter the Greenville & Port Royal Railroad Company."

That on February 10th, 1893, the said George W. Folsom, brought his action in this honorable court entitled "George W. Folsom *v.* Township of Ninety-six in the County of Abbeville, S. C., alleging among other things that the defendant, through its corporate agents, had on March 25th 1886, duly executed and issued bonds of said township aggregating twenty eight thousand dollars, with attached interest coupons at the rate of seven per cent. per annum, and of the denomination specified in said bonds, and that said George W. Folsom, had purchased certain of said past due coupons clipped therefrom, amounting in the aggregate to the sum of five thousand one hundred and ten dollars, being specifically set forth in said complaint, and alleging that no part of said coupons had been paid, and that defendant and its agents had refused and neglected to collect

said taxes for the payment of said coupons and interest, and demanding judgment to the amount of said coupons, together with interest thereon, and for the cost of said action and for the issue of a writ of mandamus directed to the proper officers to levy and collect taxes to pay said coupons.

That said action being pending, a verdict was rendered in favor of the plaintiff for the sum of seven thousand one hundred and eighteen and 78/100 dollars and for one hundred, ninety three and 15/100 dollars, on August 14th, 1896, the judgment was duly entered thereon and execution issued on August 28th, 1896, and the same was lodged in the office of the marshal for said district, but said execution has been returned wholly unsatisfied, and no part of the said judgment has been paid, and the full amount is now due and payable.

That by the act of the legislature under which said bonds were issued, it was provided: "

"SEC. 9. That for the payment of the interest on such bonds as may be issued by said counties, cities, towns, or townships, the county auditor or other officer discharging such duties, or the city or town treasurer, as the case may be, shall be authorized and required to assess annually upon the property of the said county, city town or township, such per centum as may be necessary to pay the said interest of said sum of money subscribed, which shall be known and styled in the tax books as said railroad tax, which shall be collected by the treasurer under the same regulations as are provided by law for the collection of taxes in any of the counties, cities, towns, or townships so subscribing, and which shall be paid over by the treasurer to the holders of said bonds, as the said interest shall become due on presentation of the coupons, &c."

"That at the time of the execution of the said bonds said township was situated in Abbeville county, but that thereafter, to-wit, in the year 1896, the county of Greenwood was organized in pursuance of the laws of said State, out of portions of Abbeville and Edgefield counties, and the township of Ninety-six was included in the county of Greenwood.

That demand has been made upon the proper officers of Greenwood county to assess and collect taxes for the payment of said judgment, but said officers have neglected and failed to make such assessment.

·19 That since said bonds have been executed, the legislature of said State has passed several acts forbidding under heavy penalty the levy and collection of taxes for the payment of said township bonds.

That said acts are in violation of section 10 of article 1 of the Constitution of the United States of America, but the officers charged with the duty of levying and collecting taxes to pay said bonds have obeyed the mandate in said acts and have failed to assess or collect taxes. That petitioner is advised and believing that any further effort to procure voluntary action on the part of said officers would

be idle and without effect. That the auditor for Greenwood county is T. A. Graham, and the treasurer of said county is J. A. Marshall.

That petitioners are now the owners of said judgment, and all moneys due thereon are payable to them.

Wherefore your petitioners pray:

1. That a writ of mandamus be issued directed to said auditor and said treasurer directing and demanding the said auditor to assess upon all property of said township a sufficient per centum to pay said judgment with costs, and commanding the treasurer of said county to collect the taxes so assessed and pay over the same upon the said judgment until the same be wholly satisfied.

2. For the costs of this proceeding, and for such other and further relief as in the premises may be just."

The auditor and treasurer of Greenwood county for their return to the rule to show cause submit the following answer:

"T. A. Graham, as auditor of the county of Greenwood, and J. A. Marshall, as treasurer for the same county, for return to the rule to show cause why the writ of mandamus s-ould not issue requiring these respondents respectively to assess and collect a tax as prayed for by the petition in the cause why such a writ should not issue before this court, respectfully show:

"That the respondents admit the allegations of paragraph one except the allegations thereof which allege that Ninety-six township is a subdivision of the State of South Carolina and is now included in Greenwood county which allegation is denied.

2. That respondents deny any knowledge or information sufficient to form a belief as to the matters contained in paragraph two of the said petition.

3. That neither of said respondents have knowledge or information to form a belief as to the allegations of paragraph three of the said petition and deny any knowledge or information sufficient to form a belief as to the allegations of said paragraph three and require strict proof of the same.

4. Respondents admit the allegations of paragraph four of the petition.

5. Respondents admit the allegations of paragraph five except that they allege that Greenwood county was formed in 1897 under the provisions of the constitution of 1895.

6. Respondent T. A. Graham, admits demand upon him to assess said tax and that he refused to do so and alleges that he had no power so to do.

7. Respondents admit the allegations of paragraph seven of the petition.

8. Respondents admit allegations of paragraph eight of the petition except the allegations that allege that said acts are in violation of the Constitution of the United States of America, which allegation is denied.

20 9. That these respondents further show and submit that neither of them is an officer of the county of Greenwood not

ne agent under the law of the State of South Carolina of either the olders of township bonds or the townships themselves; they are fficers of the State of South Carolina, appointed by the governor of ne said State under the provisions of law and although termed ounty officers are so styled because assigned to duty in that county nd they, therefore, submit they cannot exercise any function of hese respective officers except as authorized by the laws of the said tate.

10. That the General Assembly of the said State by its act approved n — day of —— 190– and now of force, has forbidden the respond- nts and all other like officers to assess or collect a tax for the pay- nent of subscriptions by townships to the building of railroads which ave not been built.

11. That the railroad, for the building and construction of which, he bonds alleged in the said petition *to* have been issued, has not een built.

12. That the township of Ninety-six described in the said petition, loes not exist as a corporation, because by an amendment of the Constitution of the State of South Carolina, voted by the people in he year 1902, and adopted by the General Assembly of the said State in the year 1903, the corporate existence of the said township was destroyed and all officers in said township abolished and all corporate agents removed long prior to the petition herein.

13. That the said township of Ninety-six never owned any prop- erty whatever; that it never had any officers or agents of its affairs with the single exception that the county commissioners of the county of Abbeville were authorized to hold an election for the sub- scription of bonds described in the petition and to issue bonds for the amount to be subscribed.

14. That respondents are officers under and by virtue of the pro- visions of the constitution of 1895 and the law pursuant thereto which fixes and determines their duties and power and under the terms and provisions of the said constitution and the acts of the legislature pursuant thereto, these respondents are without power to levy or collect any tax for the purpose set out in the said petition and are forbidden by the express terms of the said constitution from so doing under which said constitution they hold their appointment as officers of the State of South Carolina; that these respondents are required to give a heavy bond conditioned to faithfully discharge and perform the duties of their office in accordance with the require- ments of the law of their appointment, which prohibits and forbids doing the acts mentioned in the petition herein.

15. The respondents further submit that section 9 of the act incor- porating Ninety-six township does not make it the duty of the county auditor and county treasurer to assess and collect any tax whatever. It provides in plain terms that the said auditor and treasurer shall be authorized and required to assess and collect a certain tax men- tioned therein on the property owned by the township and it makes no provision whatever for an assessment of the property or fixing

the valuation for taxation of any property within the said territory and could not so provide, this matter being regulated and fixed by the constitution of 1868 which makes it incumbent on the legislature to provide a regular way applicable alike to all counties for said purpose.

16. That at the time the bonds and coupons mentioned in the petition herein are alleged to have been issued, the township of Ninety-six was a territorial sub-division of the county of Abbeville and whatever duty was imposed on the county auditor and treasurer had reference entirely to those officers acting for Abbeville county and Abbeville county is still in existence and still has a county auditor and county treasurer; that the respondents are the county auditor and county treasurer respectively for Greenwood county which was formed under the provisions of the constitution of 1895 and acts of the legislature of 1897 and they are not officers or agents of Ninety-six township for any purpose whatever and are not officers
21 or agents of the holders of the said bonds or judgment mentioned in the petition and have no desire to act as such officers or agents; that they can and do exercise the duties of county auditor and county treasurer respectively in compliance with the law of the State under which they were appointed and commissioned without reference to any duty or obligation of what was known as Ninety-six township as a township and in accepting the office of county auditor and county treasurer they did so under the laws then in existence and of force and afterwards to be enacted, fixing their duties and defining their power and not as officers or agents of the said township which position each of them declined to accept and exercise.

Wherefore, because it is doubtful that the petitioner ever obtained the alleged judgment and because it is impossible for the respondents to determine what property is subject to taxation on account of the demand alleged to be in judgment, and because the respondents do not possess or control any property ever belonging to the said township, and because the said county of Greenwood never succeeded to any right of property of the said township, and because the collection of the taxes prayed for is beyond the scope of authority and duty of the respondents, and because the said respondents cannot, under the law of their appointment, comply with the writ without violating their oath of office and the law appointing them, and because the township of Ninety-six has no corporate existence, agents or officers, and for the other good and sufficient reasons shown herein, they pray that the said rule be discharged."

From an examination of the record it will be seen that every question in this litigation from its inception has been settled by former adjudications, except such questions as may have arisen by virtue of the constitutional amendment which was adopted in 1903. Such being the case, we are to consider first, the question whether the legal entity of the township of Ninety-six has been abolished; second, and if it shall appear that the corporate existence of the

township has been abolished, what is the effect of the acts of 1882–1885, which provide the means for the assessment and collection of the taxes to pay the interest and principal of the bonds. The language of the statute of 1885 is so plain and direct that there can be no question as to its meaning. It provides in plain and unmistakable terms the means as well as the mode of procedure by which the taxes in question are to be assessed and collected. The county auditor and treasurer are designated by the legislature as the instrumentalities by which the bond holders are to be afforded a remedy.

Its provisions which relate to the assessment and collection of the tax are a part of the condition of the contract which induced the bond holders to invest their money, and cannot be destroyed by any legislative acts passed subsequent to the issue of the bonds in pursuance of former acts of the legislature.

"By the obligation of a contract is meant the means which, at the time of its creation, the law affords for its enforcement."

Nelson *v.* St. Martin's Parish, 111 U. S. 720.

22 "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced,—by which the parties can be obliged to perform it."

Louisiana *v.* New Orleans, 102 U. S. 206.

It cannot be doubted that the constitutional amendment of 1903, was intended to impair the means provided by law for the payment of these bonds, to this extent it is obnoxious to article 1, clause 10 of the Constitution of the United States.

Mr. Justice Swayne, in delivering the opinion of the court in Walker *v.* Whitehead, 16 Wall. page 317, said:

"The Constitution of the United States declares that no State shall pass any "law impairing the obligations of contracts." These propositions may be considered consequent axioms in our jurisprudence:

The laws which exist at the time and place of the making of a contract and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge, and enforcement; nothing is more material to the obligation of a contract than the means of enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against impairment;

The obligation of a contract "is the law which binds the parties to perform their agreement;"

Any impairment of the obligation of a contract—the degree of impairment is immaterial—is within the prohibition of the Constitution;

The States may change the remedy, provided that no substantial right secured by the contract is impaired. Whenever such a result is produced by the act in question, to that extent it is void. The

States are no more permitted to impair the efficacy of a contract in this way than to attack its vitality in any other manner. Against all assaults coming from that quarter, whatever guise they may assume, the contract is shielded by the Constitution. It must be left with the same force and effect, including the substantial means of enforcement, which existed when it was made. The guarantee of the Constitution gives it protection to that extent.

The effect of these propositions upon the judgment before us requires but a slight remark. A clearer case of law impairing the obligation of a contract, within the meaning of the Constitution, can hardly occur."

The attempt to abolish the township and destroy the machinery for taxation, and to transfer the territory to another county, is a direct attack upon the remedy which is given the petitioner by the acts which authorized the issuance of the bonds, and the fact that the attempt is made by constitutional enactment does not give it any additional force.

The provisions of the acts of 1882 and 1885, which relate to the assessment and collection of taxes are a part of the conditions of the contract which induced the bondholders to invest their money and this contract cannot be impaired. The authority for an annual tax for the payment of the bonds being granted by the legislature at the time of the issuance of the same cannot be revoked by the legislature, unless some other remedy equally as efficacious is provided as a substitute.

In the case of Hicks *v.* Cleveland, 45 C. C. A., page 429, Judge Simonton in discussing this phase of the question said:

23 "The Supreme Court of the United States deals with the provisions of statutes like this as creating a trust which the State, the donor, can not annul, and which the officers to whom the power is given are bound to execute. So neither the State nor the corporation can any more impair the obligation of the contract by repeal of the act than they can in any other way."

93 U. S. 266:

Von Hoffman *v.* Quincy, 4 Wall. 553:

Mount Pleasant *v.* Beewith, 100 U. S. 514:

If the payment of debts could be defeated by the means employed in this case, then there would be no security as to any contracts which the individual might enter into in cases wherein the power to contract is derived from legislative authority. The law does not contemplate that any one shall be permitted directly or indirectly to repudiate an honest obligation.

The act of 1885, which vested the township with corporate functions was passed solely for the purpose of this contract and as such was intended to afford the bond holders a safe and sure remedy. It did not undertake to incorporate the township as a general municipal corporation, it simply gave the township certain functions to be exercised solely and exclusively for the purpose of making and dis-

charging the contract, and the provisions of the same thereby became a part of the essential elements of the contract, and do not in anywise partake of the character of the powers ordinarily conferred upon a township or other territory in order to enable such township or territory to exercise the functions of a municipal corporation. Therefore, the constitutional enactment in question is not aimed at a municipal corporation, but is in the nature of a direct attack upon legislation which has for its object the enforcement of a contract.

No one questions the power of the legislature at any time to abolish a municipal corporation, provided that in doing so it does not impair the obligation of a contract; but in this instance the acts in question do not have the effect of abolishing a municipal corporations as such,—the constitutional and legislative enactments
24 being directed against the means by which the holders of the bonds are to be paid the amounts due them.

In case of Von Hoffman *v.* Quincy, 4 Wall. page 553, among other things Mr. Justice Swayne, who delivered the opinion of the court, said:

"It is competent for the States to change the form of the remedy or to modify it otherwise, as they may see fit, provided that no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the act is within the prohibition and to that extent void."

We now come to consider the question as to whether the means provided as a remedy are in any way connected with that part of the act which confers corporate powers upon the township.

If the contention that the legislature had the right to destroy the corporate existence of the township be true, we are nevertheless confronted with the fact that the instrumentalities and means employed by the legislature, in this instance, for the purpose of enforcing the collection of a tax are still unimpaired.

The duties of the officers designated for the assessment and collection of taxes are not affected in any manner by the acts which undertook to abolish the township. In other words, even though it should be held that the township as a corporate entity no longer exists, however, the remedy which is provided for the collection of taxes is still in force. Therefore, if the contention of respondent that the township is abolished be correct, then we have the act which makes the levy and authorizes the assessment and collection of taxes in a certain territory for the payment of an indebtedness evidenced by bonds upon which judgment has been obtained in a regular manner the instrumentality for its collection remains the same as when the act in question was passed.

The county auditor and treasurer are not officers or agents of the township in any sense of the word. Inasmuch as the acts of 1882

and 1885, constitute the county commissioners as the corporate agents of the township, and at the same time authorized the county auditor and treasurer to perform duties incident to the assessment and collection of taxes that are separate and distinct from those assigned to the county commissioners it cannot be contended
25 that the legislature intended to authorize the auditor and treasurer to act as agents of the township. The act provides that the county commissioners shall be the agents of the township and clothes them with discretionary power to wit, the power to issue bonds when certain conditions are complied with. The power which was conferred upon them has been exercised in the issuance of the bonds and since they have performed the duties encumbent on them as agents of the township they are powerless to do anything further in the premises. It is different when we come to consider the authority which was conferred on the county treasurer and auditor by the legislature. While the duties of the county commissioners were simply to issue the bonds and deliver the same, the county auditor and treasurer are authorized and empowered to do that which may be lawfully done independent of the corporate existence of the township.

In this case a judgment has been obtained and the liability of the township for the payment of these bonds judicially determined. The court is now called upon to enforce the laws of the State existing at the time of the execution of the bonds, the provisions of which enter into and constitute an essential element thereof. Conceding that the constitutional enactment is valid and that it has had the effect to abolish the corporate existence of the township, we cannot escape the conclusion that the means and procedure provided for the enforcement of the contract remain unaltered. The officials chosen by the legislature as instrumentalities for the assessment and collection of the tax are in existence and it is the duty of the court to compel the enforcement of the same irrespective of the result of any attempt which may have been made to abolish the township. It is contended by the respondent that the territory of township Ninety-six as a sub-division of the county of Abbeville no longer exists as such, and that the same has been transferred and embraced as a part of one of the territorial sub-divisions of the county of Greenwood and therefore the court is without authority to compel the auditor and treasurer of the new county to enforce the assessment and collection of the tax in the territory which formerly was included in the county of Abbeville. This position is untenable and cannot be sustained.

The creation of the new county of Greenwood and the transfer of the territory of township Ninety-six to said county as a part of its territory does not alter the status of the territory thus trans-
26 ferred in so far as it is affected by the acts of 1882 and 1885, which provide that the county auditor and treasurer shall assess and collect annually a tax upon the property included in said territory. It has been repeatedly held that where a subdivision of

the State has contracted a debt, such debt follows the people of the newly acquired territory. In cases where an indebted municipality is divided among other municipalities the debt follows the territory and the duty of assessing and collecting taxes applies to the new officers in whose jurisdiction it comes.

Broadfoot *v.* Fayetteville 124 N. C. 478 :
Mobile *v.* Watson, 116 U. S. 289 :

Counsel for respondent insist that it will work a hardship upon the property owners of the township to compel them to pay taxes to meet the obligations of the contract from which they can never realize any benefit.

The unfortunate condition which the property owners now occupy is due in a large measure to the failure on the part of the legislature at the time of the passage of the act to provide that the bonds should not be issued until the railroad had been completed through the territory in question. While the contention of the respondent as to the lamentable condition of the township is true, it is equally true that a failure on the part of the inhabitants of the township to comply with the obligations which they entered into at the time the bonds were issued will work a hardship on the owners of the bonds who are innocent purchasers and who are in nowise responsible for the issuance of the bonds in the first instance, nor for the failure of the railroad company to complete its road through the territory in question.

In view of the foregoing it is ordered, that a writ of mandamus issue directed to the said auditor and treasurer of the county of Greenwood, commanding the said auditor to assess upon the property in said township and continue to assess from year to year until a sufficient per centum is raised to pay said judgment and costs and commanding said treasurer of said county to collect such tax so assessed and pay over the same upon said judgment until the same is wholly satisfied.

July 30th, 1904.

J. C. PRITCHARD,
Circuit Judge.

27 Writ of Mandamus.

Filed August 8, 1904.

UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit.

Ex Parte S. ELLEN FOLSOM, JENNIE F. PECK, and NANNIE F. MCCANLESS.

In re GEORGE W. FOLSOM, Plaintiff,
against
TOWNSHIP OF NINETY-SIX, Defendant.

To T. A. Graham, county auditor for Greenwood county, and his successors in office, and J. A. Marshall, county treasurer for Greenwood county, and his successors in office, Greeting:

Whereas under and by virtue of an act of the General Assembly of the State of South Carolina entitled "An act to charter the Greenville and Port Royal Railroad Company" approved December 23, 1882, and amended on December 24, 1885, by an act entitled "An act to amend an act entitled 'An act to charter the Greenville and Port Royal Railroad Company,'" certain townships in said State were authorized to subscribe to the stock of said railway company, and to issue bonds in payment thereof, and whereas by said act it was further provided that for the payment of interest on such bonds as might be issued by the township, the county auditor should annually assess such per centum as might be necessary to pay the said interest, to be known on the tax books as railroad tax, and the county treasurer was directed to collect the same under the same regulations as are provided by law for the collection of other taxes, and to pay over the same to the holders of said coupons,

28 And whereas in pursuance of said act the Township of Ninety-six, then situate in Abbeville county, did issue certain of its corporate bonds, and whereas George W. Folsom, a citizen of the State of Tennessee, did on February 10, 1893, bring his action in this court against said Township of Ninety-six upon certain of the interest coupons cut from said bonds, which action on August 14, 1896 resulted in a judgment against said township for the sum of seven thousand one hundred and eighteen and 78/100 dollars and one hundred and ninety-three and 15/100 dollars as costs,

And whereas execution was issued thereon and lodged in the office of the marshal, but was returned wholly unsatisfied, and no part of said judgment has been paid, and whereas subsequently the county of Greenwood was formed, and the township of Ninety-six was trans-

ferred from Abbeville county to Greenwood county, and is now within the limits of said Greenwood county,

And whereas heretofore his honor Judge J. C. Pritchard issued a rule requiring the said auditor and said treasurer to show cause why a writ of mandamus should not be issued against them requiring them to assess and collect a tax sufficient to pay the said judgment, which rule was duly served upon said officers, who made return thereto, and whereas upon the hearing of said return, his honor Judge J. C. Pritchard did adjudge the same insufficient and direct that a writ of mandamus issue as prayed for,

Now therefore, you, the said T. A. Graham, county auditor for Greenwood county, and your successors in office, and you, the said J. A. Marshall, county treasurer for Greenwood county, and your successors in office, are hereby commanded and enjoined that immediately after the receipt of this writ and without delay, you do as follows, to wit: the said county auditor do assess at such times as are appointed by law for the assessment of taxes a per centum against all of the property in Ninety-six township subject to taxation sufficient to pay the said judgment with
29 interest and costs, said tax to be entered upon your books as railroad tax; and the said county treasurer do collect the said tax so assessed under the same regulations as are provided by law for the collection of other taxes in the county of Greenwood, and do further pay over the same to the petitioners herein until the said judgment be fully satisfied, and the said county auditor and county treasurer are hereby required to continue making assessments and collections of taxes in the manner aforesaid until the said judgment be fully satisfied. And that you, the said county auditor and treasurer do certify perfect obedience and due execution of this writ to this court. Hereof fail not at your peril.

Witness Honorable Melville W. Fuller, Chief Justice of the Supreme Court, this August 8th, 1904.

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

[SEAL OF COURT.]

30 Marshal's Return of Service.

UNITED STATES OF AMERICA, } ss:
District of South Carolina, }

I hereby certify and return that I served the annexed writ of mandamus on the therein named T. A. Graham known to me to be the county auditor of Greenwood county, and J. A. Marshall known to me to be the county treasurer of Greenwood county by handing to and leaving a true and correct copy thereof with each of them personally at Greenwood in said district on the 10th, day of August, A. D. 1904.

J. DUNCAN ADAMS,
U. S. Marshal,
By A. B. ELLIS, JR., Deputy.

31 Petition for Writ of Error.

Filed September 19, 1904.

UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit. At Law.

Ex Parte S. ELLEN FOLSOM, JENNIE F. PECK, and NANNIE F. MCCANLESS.

In re GEORGE W. FOLSOM, Plaintiff,
vs.
TOWNSHIP OF NINETY-SIX, Defendant.

To his honor J. C. Pritchard, judge of the United States circuit court in and for the fourth circuit:

The petition of T. A. Graham, county auditor for Greenwood county, in the State of South Carolina, and J. A. Marshall, county treasurer for said county, respectfully shows to your honor that on or about the 30th day of July, A. D. 1904, the circuit court entered a judgment herein in favor of the petitioner and against the respondents, in which judgment and the proceedings had in this cause, certain errors were committed to the prejudice of the respondents, all of which will more in detail appear from the assignment of errors, which is filed with this petition.

Wherefore, respondents pray that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

F. BARRON GRIER,
J. B. PARK,
32 JOS. A. McCULLOUGH,
Attorneys for Respondents.

33 Assignment of Errors.

Filed September 19, 1904.

UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit. At Law.

Ex Parte S. ELLEN FOLSOM, JENNIE F. PECK, and NANNIE F. MCCANLESS.

In re GEORGE W. FOLSOM, Plaintiff,
vs.
TOWNSHIP OF NINETY-SIX, Defendant.

The respondents, in connection with their petition for writ of error in this cause, from the judgment or final decree of said court in said cause in awarding a peremptory writ of mandamus, assign the following errors:

1.

That the court erred in sustaining the petition for mandamus herein.

2.

The court erred in ordering,

"That a writ of mandamus issue, directed to the said auditor and treasurer of the county of Greenwood, commanding the said auditor to assess upon the property in said township, a sufficient per centum to pay said judgment and costs and commanding said treasurer of said county to collect such tax so assessed and pay over the same upon said judgment until the same is wholly satisfied."

3.

The court erred in over-ruling the return of respondents herein.

4.

34 The court erred in holding that the constitutional amendment of 1903, abolishing the corporate existence of the defendant township, and the act of the General Assembly ratifying said constitutional amendment, are in contravention of the Constitution of the United States, article 1, clause 10.

5.

The court erred in holding,

"From an examination of the record, it will be seen that every question in this litigation from its inception has been settled by

former adjudication except such questions as may have arisen by virtue of the constitutional amendments, which were adopted in 1903," the error being:

a. The power invoked (mandamus) is not the power to pay judgments, but the power to tax to pay bonds considered as distinct and independent, and it appearing that the petitioners was compelled to go behind his judgments, as money judgments merely, to obtain the remedy pertaining to the bonds, the court was bound to take cognizance of all questions bearing upon the validity of the said bonds, and the right of the petitioners to the writ prayed for.

b. The case presented by the petition and return was an entirely new case, and none of the questions presented were settled by any former adjudication of any court.

6.

The court erred in holding as follows:

"It cannot be doubted that the constitutional amendment of 1903 was intended to impair the means provided by law for the payment of these bonds, to this extent it is obnoxious to article 1, clause 10 of the Constitution of the United States,"—the error being:

a. The court had no right to impute bad motives to the legislature, and it was error so to do in this instance.

b. There was no testimony whatever to support such a finding, and conclusion on behalf of his honor and without the most positive and convincing testimony, the court will not impute bad motives to the legislature of a sovereign State and an inspection of the constitutional amendment in question does not warrant such a conclusion in this case.

c. The legislature of South Carolina, under its general authority as well as by act ratified the 17th day of December 1841, XI Stat., 183, has full control over all corporations, municipal as well as private, and thereafter created by it, and reserves to itself the right to alter, repeal or amend the charter of any corporation thereafter created by it. When the legislature chartered the township of Ninety-six, it was subject to this paramount right to repeal, and the creditors took these bonds with notice thereof, and when thereafter the corporate existence of the township was destroyed it was in the exercise of this reserved power, and it was not intended to impair the obligation of any contract entered into by the said township.

7.

The court erred in holding:

"The attempt to abolish the township and destroy the machinery of taxation and to transfer the territory to another county is a direct attack upon the remedy, which is given the petitioners by the acts which authorize the issuance of the bonds, and the fact that the attempt is made by constitutional enactment does not give it any additional force," the error being:

a. The act abolishing the said township does not purport to aim

directly at the remedy furnished the creditors by the act authorizing the issuance of said bonds, and is not so aimed.

b. His honor thereby imputed to the legislature of the State of South Carolina, as well as the people at large, who vote in favor of the said constitutional amendment, a fraudulent purpose and bad motives without any testimony whatever to support the said conclusion and without any legal right so to do.

c. The act of his honor, in so holding and deciding, was a
36 direct invasion by the judicial department of the government of the powers, rights and functions of the legislative department.

d. It was perfectly competent for the constitutional convention of 1895 to form the new county of Greenwood and to change existing lines, and no contract entered into by the said township could have the effect of depriving the said constitutional convention of such right, nor of depriving the legislature, under constitutional provisions, of abolishing the corporate existence of said municipality.

8.

Error in holding,

"The provisions of the acts of 1882 and 1885, which relate to the assessment and collection of taxes, are a part of the conditions of the contract, which induced the bond-holders to invest their money and this contract cannot be impaired. The authority for an annual tax for the payment of the bonds being granted by the legislature at the time of the issuance of the same, cannot be revoked by the legislature, unless some other remedy equally as efficacious is provided as a substitute,"—the error being:

a. His honor erred in holding that the constitutional amendment abolishing the existence of the said townships and the action of the constitutional convention of 1895 in creating the said county of Greenwood and in dividing the territory of the said township of Ninety-six, had the effect of impairing the obligation of the contract. No act can be construed as impairing the obligation of a contract, unless, by its terms, it is aimed directly at the contract, or in some way purports to effect the terms of the act authorizing such contract.

b. The paramount right of the legislature of a sovereign State to repeal, alter or amend the charter of a municipal corporation of its creation cannot be controlled or effected by any contract which may be entered into by the said corporation.

c. The right of the legislature of South Carolina reserved to itself by the provisions of the acts of 1841, 11 Stat., page 183,
37 to repeal, abolish or alter the charter of any corporation, municipal or otherwise, can never be effected and is not effected by any contract of a corporation created by said legislature and the terms of the said acts are written into every charter as a part of the said charter and therefore no corporation can make any contract of any kind with any one which will have the effect to limit, control or hamper the legislature in its dealings with the said corporation

or destroying its corporate existence. This being a part of the charter of the corporation all persons who deal with it are chargeable with notice of its charter rights and powers among which is this reserved right in the legislature and his honor, therefore, erred in not so holding and deciding.

9.

Error in holding:

"The act of 1885, which invested the township with corporate functions was passed solely for the purpose of this contract and as such was intended to afford the bond-holders a safe and sure remedy. It did not undertake to incorporate the township as a general municipal corporation, it simply gave the township certain functions to be exercised solely and exclusively for the purpose of making and discharging the contract, and the provisions of the same thereby became a part of the essential elements of the contract, and do not in any wise partake of the character of the powers ordinarily conferred upon a township or other territory in order to enable such township or territory to exercise the functions of a municipal corporation. Therefore, the constitutional enactment in question is not aimed at a municipal corporation, but is in the nature of a direct attack upon legislation, which has for its object the enforcement of a contract," error being,

a. Under the constitution of 1868 in force at the time the act authorizing the issue of these bonds was ratified, the legislature could not delegate the power of taxation to any but a public municipal corporation to be exercised for a corporate or governmental purpose, the building of a railway was for such purpose as held by the
38 Supreme Court of the United States in Folsom *vs.* Ninety-six Township, 159 U. S., page 612. The defendant corporation, therefore, became assimilated to all other public municipal corporations created for a public or governmental purpose, which corporations are at all times subject to legislative enactments.

b. The act in question incorporating the said township did not limit it to the single power of subscribing to the capital stock of the proposed railway, and even if it had, such power, being for a public or governmental purpose, the same rules, which apply to other public municipal corporations would apply equally to this one.

c. If the township was incorporated as a municipal corporation, or governmental agency, it could make no difference whether it were clothed with one or a dozen different functions, it would nevertheless be a general municipal corporation subject absolutely to legislative control, and no contract entered into on the part of said corporation could deprive the legislature of its general and reserved right to destroy its corporate existence at any time it saw fit, and creditors dealing with it did so subject to such contingency.

9.

The court erred in holding:

"No one questions the power of the legislature at any time to

abolish a municipal corporation, provided that in doing so it does not impair the obligation of a contract; but in this instance, the acts in question do not have the effect of abolishing a municipal corporation, as such, the constitutional and legislative enactments being directed against the means by which the holders of the bonds are to be paid the amounts due them," the error being:

a. The acts in question do have the effect of abolishing the said municipal corporation, being an exercise of legitimate legislative power and in accordance with the right reserved by the act
39 of 1841 in express terms giving the legislature the authority to alter, amend or repeal the charter of any corporation thereafter created.

b. The legislative and constitutional enactments in question were not directed against the means by which the holders of the bonds are to be paid the amounts due them, but seek only to destroy the corporate exercise of legislative authority, and the fact that the effect of such act might be to deprive the creditor the fruits of his judgment does not render the said act obnoxious to the Federal Constitution, as decided by numerous decisions of the United States Supreme Court.

11.

The court erred in holding:

"If the contention that the legislature had the right to destroy the corporate existence of the township be true we are nevertheless confronted with the fact that the instrumentalities and means employed by the legislature, in this instance, for the purpose of enforcing the collection of tax are still unimpaired," the error being:

a. Under the provisions of the constitution of 1868, article 9, paragraph 8, which authorized the acts of 1882 and 1885, under which the bonds in question were issued, only the "corporate authorities" of the municipalities therein mentioned could be invested with power to assess and collect taxes for corporate purposes, and unless the county auditor and county treasurer in this case were "corporate authorities" for the said township under the said section of the constitution, they would have absolutely no power to assess and collect taxes on behalf of said township, and the legislature itself could not impose upon them such duties, since it would be in violation of said constitutional provision. If, therefore, these officers are to be considered the corporate agents of the said township for the purpose of assessing and collecting such taxes, then by the constitutional and legislative acts, abolishing the corporate existence of said township and removing all corporate agents, the said county auditor and
40 county treasurer could no longer be considered as agents of such township, and could no longer be required, as such agents, to perform any duties whatsoever on behalf of said township. A dead principal can have no living agent, and the act destroying the principal involves also the destruction of all agents.

12.

After having held and decided as follows:

"The county auditor and county treasurer are not officers or agents of the township in any sense of the word,"

His honor was in error in ordering and adjudging that a peremptory writ of mandamus do issue directed to the said auditor and treasurer of the county of Greenwood, commanding the said auditor to assess on the property of the said township a sufficient per centum to pay the said judgment and costs and commanding the said treasurer of the said county to collect such tax so assessed and pay over the same upon said judgment until the same is wholly satisfied, the error being:

a. Under the constitution of 1868 only the agents of the said corporation could be required to assess and collect taxes on behalf of the said township.

b. Unless the said auditor and treasurer were agents of the said township no duty was ever imposed upon either of them in the matter of assessing or collecting said taxes.

c. If the said officers are not agents of the said corporation but are State officers, then this proceeding cannot be maintained, because it is in effect a suit against the State to compel it, through its officers and agents to perform a duty which it owes the bondholders, and is, therefore, obnoxious to the Federal Constitution prohibiting a suit against a State except by its consent.

13.

The court erred in holding,

"The county auditor and treasurer are authorized and empowered to do that which may be done lawfully independent of the
41 corporate existence of the township," the error being:

a. That under article 9, section 8 of the constitution of 1868, the legislature could only cloth- a municipal corporation with power to levy and collect taxes, (1st) for corporate purposes, and (2nd) by and through its corporate agents, and the legislature in this case not having itself directly levied the tax in question, but having delegated such power to the municipal corporation (Construction Co., *vs.* Township, 49 S. C., page 535) the tax could only be levied by the corporation and collected through its officers and agents.

14.

The court erred in not holding and adjudging that the respondents herein were without power to levy and collect the tax for the payment of plaintiff's judgment under the act of South Carolina approved the 25th day of February, 1902, volume 23, Statutes at Large, page 1181, providing for the appointment by the governor of a township assessor and township collector, requiring them to assess and collect all taxes on behalf of all townships therein mentioned.

15.

The court erred in not holding and adjudging that the corporate existence of the township of Ninety-six having been abolished and its corporate officers and agents removed, and the creditor being limited to enforcing the remedy provided for by the act, that the said respondents were not officers or agents of the said corporation, and were not subject to the process of this court.

16.

It was error in his honor not to over-rule the following portion of paragraph 8 of the petition herein, to wit, "That the said acts are in violation of section 10 of article I of the Constitution of the United States." Whereas his honor should have held that the said acts were not in violation of the Constitution of the United States and for this reason dismissed the said petition for mandamus.

42 It was error in his honor to hold,

"Conceding that the constitutional enactment is valid and that it has had the effect to abolish the corporate existence of the township, we cannot escape the conclusion that the means and procedure provided for the enforcement of the contract remain unaltered. The officials chosen by the legislature as instrumentalities for the assessment and collection of the tax are in existence and it is the duty of the court to compel the enforcement of the same irrespective of the result of any attempt which may have been made to abolish the township."

The error being:

a. That under the constitution of 1868 only the corporate authorities of townships could be empowered to levy and assess a tax for the townships.

b. Unless the said auditor and treasurer were the agents of the townships no duty was ever imposed or could be imposed upon either of them in the matter of assessing or collecting said taxes.

c. If the said officers are not agents of the said townships but are State officers, then this proceeding cannot be maintained because it is in effect a suit against the State to compel it, through its officers and agents to perform a duty which it owes the bondholders, and is, therefore obnoxious to the Federal Constitution prohibiting a suit against a State except by its consent.

Wherefore respondents pray that the said judgment be reversed.

F. BARRON GRIER,
J. B. PARK,
JOS. A. McCULLOUGH,
Attorneys for Respondents.

43 Appeal Bond and Approval.

Filed 19 September, 1904.

UNITED STATES OF AMERICA,
District of South Carolina.

Know all men by these presents, that T. A. Graham, county auditor for Greenwood county, in the State of South Carolina, and J. A. Marshall, county treasurer for said county, as principals, and J. P. Phillips, M. H. Coleman, W. J. Moore and Geo. H. Taylor, as sureties, are held and firmly bound unto petitioners herein in the full and just sum of five hundred dollars, to be paid to the said petitioners, their executors, administrators, or assigns; to which payment, well and truly to be made, we, the said principals and said sureties, bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Witness our hands and seals this 8th day of September, in the year of our Lord one thousand nine hundred and four.

Whereas, lately the circuit court of the United States for the district of South Carolina, in a suit pending in said court entitled *Ex parte* S. Ellen Folsom, *et al. In re* George W. Folsom, plaintiff, against Township of Ninety-six, in the County of Greenwood, State of South Carolina, defendant, a certain order was signed and passed by his honor, Judge J. C. Pritchard, U. S. judge, directing a writ of mandamus to issue, commanding the said T. A. Graham to make certain assessments of taxes on the property in said township of Ninety-six, and directing and commanding the said J. A. Marshall to collect said taxes when so assessed, and the said T. A. Graham and J. A. Marshall having obtained the writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said order in the aforesaid suit, and a citation directed to the said petitioners citing and admonishing them to be and appear at a session of the United States Supreme Court to be holden at the city of Washington on the day in said citation mentioned.

Now the condition of the above obligation is such that if
44 the said T. A. Graham and J. A. Marshall shall prosecute said writ of error to effect and answer all costs and damages if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

T. A. GRAHAM. [L. S.]
J. A. MARSHALL. [L. S.]
J. P. PHILLIPS. [L. S.]
M. H. COLEMAN. [L. S.]
W. J. MOORE. [L. S.]
GEO. H. TAYLOR. [L. S.]

Signed, sealed and delivered in presence of:
R. M. HAYS.

Signed, sealed and delivered in presence of:
R. M. HAYS.

STATE OF SOUTH CAROLINA, }
County of Greenwood. }

Personally appeared before me R. M. Hays, who being duly sworn says that he saw the within named J. P. Phillips, M. H. Coleman, W. J. Moore, and Geo. H. Taylor, sign, seal and deliver the within instrument, and that he witnessed the due execution of the same.

R. M. HAYS.

Sworn to before me this 8th, day of Sept. 1904.

[SEAL.] T. C. TURNER, C. C. C. P.

STATE OF SOUTH CAROLINA, }
County of Greenwood. }

Personally appeared befcre me R. M. Hays, who, being duly sworn, says that he saw the within named T. A. Graham and J. A. Marshall sign, seal and deliver the within instrument, and that he witnessed the due execution of the same.

R. M. HAYS.

Sworn to before me this 8th, day of Sept. 1904.

[SEAL.] T. C. TURNER, C. C. C. P.

45 STATE OF SOUTH CAROLINA, }
County of Greenwood. }

Personally comes J. P. Phillips and M. H. Coleman and W. J. Moore, Geo. H. Taylor, who each being duly sworn each for himself and not one for the other makes oath and says, that he is a resident and freeholder of said State and county above written, that he is worth clear of all debts and exemptions the sum of five hundred dollars.

J. P. PHILLIPS.
M. H. COLEMAN.
W. J. MOORE.
GEO. H. TAYLOR.

Sworn to and subscribed before me this the 8th day of Sept. A. D. 1904.

[SEAL.] T. C. TURNER, C. C. C. P.

Bond approved:
J. C. PRITCHARD,
Circuit Judge.

46 Order Allowing Writ of Error.

Filed 19 September, 1904.

The Circuit Court of the United States for the Western District of South Carolina.

Ex Parte S. Ellen Folsom, Jennie F. Peck, and Nannie F. McCanless.

In re George W. Folsom, Plaintiff,
vs.
Township of Ninety-six, Defendant. } At Law.

This 16th day of September, A. D. 1904, come the respondents by their attorneys and file herein and present to the court their petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by them, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the court does allow the writ of error upon the respondents giving bond according to law in the sum of five hundred dollars ($500.00), which shall operate as a supersedeas bond.

J. C. PRITCHARD,
U. S. Circuit Judge.

47 Writ of Error.

Filed September 19, 1904.

The United States of America:

The President of the United States of America to the judge of the circuit court of the United States for the western district of South Carolina, Greeting:

Because, in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between *Ex parte* S. Ellen Folsom, Jennie F. Peck and Nannie F. McCanless, *In re*, George W. Folsom, plaintiff, *vs.* Township of Ninety-six, defendant, a manifest error has happened to the great damage of the said respondents, as by their complaint appears. We being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that

under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the 14th day of October, 1904 next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of Sept. 1904, in the year of our Lord, and of the Independence of the United States of America the one hundred and twenty-ninth.

[Seal U. S. Circuit Court, District of So. Carolina.]

C. J. MURPHY,
Clerk of the Circuit Court of the United States
for the Western District of South Carolina.

Allowed by:
J. C. PRITCHARD,
Circuit Judge.

48 Citation to Defendant in Error.

The United States of America to S. Ellen Folsom, Jennie F. Peck, and Nannie F. McCanless, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the 14th day of October, 1904, next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of South Carolina, wherein you are defendants in error and T. A. Graham and J. A. Marshall are plaintiffs in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand and seal at the city of Asheville, in the circuit and district named above, this 16th day of Sept., in the year of our Lord one thousand nine hundred and four.

J. C. PRITCHARD,
Judge of the Circuit Court of the United States
for the Western District of South Carolina.

Filed Sep. 19, 1904.

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

49 [Endorsed:] I hereby acknowledge that the within citation has been served upon us. Sept. 16th 1904 Haynsworth & Parker, attorneys for pl'ff.

50 Clerk's Certificate.

UNITED STATES OF AMERICA,
District of South Carolina. }

In the Circuit Court, Fourth Circuit. At law.

I, C. J. Murphy, clerk of the circuit court of the United States for the district of South Carolina, do hereby certify that the foregoing is a true and correct copy of the petition for mandamus and the proceedings had thereunder, in the case entitled *Ex parte* S. Ellen Folsom, Jennie F. Peck and Nannie F. McCanless, *In re* George W. Folsom, plaintiff, against Township of Ninety-six, defendant, as appears by the records now on file in my office.

Given under my hand and seal of said court, at Charleston, S. C., in the district aforesaid, this 5th, day of October, A. D. 1904.

[Seal U. S. Circuit Court, District of So. Carolina.]

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

Endorsed on cover: File No. 19,493. South Carolina C. C. U. S. Term No. 108. T. A. Graham, county auditor for Greenwood county, and J. A. Marshall, county treasurer of Greenwood county, South Carolina, plaintiffs in error, *vs.* S. Ellen Folsom, Jennie F. Peck, and Nannie F. McCanless. Filed October 13", 1904. File No. 19,493.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 108.

T. A. GRAHAM, COUNTY AUDITOR FOR GREENWOOD COUNTY, AND J. A. MARSHALL, COUNTY TREASURER OF GREENWOOD COUNTY, SOUTH CAROLINA, PLAINTIFFS IN ERROR.

versus

S. ELLEN FOLSOM, JENNIE F. PECK, AND NANNIE F. McCANLESS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

BRIEF FILED ON BEHALF OF PLAINTIFFS IN ERROR.

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Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 108.

T. A. GRAHAM, COUNTY AUDITOR FOR GREENWOOD COUNTY, AND J. A. MARSHALL, COUNTY TREASURER OF GREENWOOD COUNTY, SOUTH CAROLINA, PLAINTIFFS IN ERROR.

versus

S. ELLEN FOLSOM, JENNIE F. PECK, AND NANNIE F. McCANLESS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

BRIEF FILED ON BEHALF OF PLAINTIFFS IN ERROR.

STATEMENT OF FACTS.

On the 25th day of March 1886, the Township of Ninety Six, then a corporate body situate in the County of Abbeville, State of South Carolina, under and by virtue of authority conferred upon it by an Act of the General Assembly of South Carolina, approved December 23, 1882 and amended December 24th, 1885, issued its bonds and attached coupons, aggregating some twenty-eight thousand dollars. George W. Folsom became the owner of some of these bonds with coupons attached. Having failed to pay certain of the coupons, suit was commenced against Ninety Six Township by George W. Folsom on the 10th day of

February, 1893, and judgment rendered against the said Township on the 14th day of August 1896, on which judgment execution was issued August 28, 1896 but no return has been made on said execution.

The petitioners allege that they are the owners of this judgment, and this proceeding is brought by them for the purpose of having the Court issue a writ of mandamus against T. A. Graham, County Auditor and J. A. Marshall, County Treasurer of Greenwood County, requiring them to assess and collect taxes on the property situate within the territory formerly embraced in Ninety Six Township to be applied to the satisfaction of said judgment.

The Acts of the General Assembly, above mentioned were passed under the provisions of the Constitution of South Carolina, generally known as "The Constitution of 1868" which constitution was in force in the State at that time.

In the year 1895 the people of South Carolina adopted a new Constitution, generally known as "The Constitution of 1895." Among other things, "The Constitution of 1895" provides for the establishment of new counties. (See Art. VII, Sections 1, 2, 3 et seq.)

In the year 1897 the County of Greenwood was formed by an Act of the General Assembly (See Vol. 22, Stat. S. C. 604-612 and 904) by incorporating therein certain territories thereby cut off from the old Counties of Edgefield and Abbeville. Included in the territory taken from the old County of Abbeville and incorporated in the new County of Greenwood, was the territory which until the year 1903 comprised Ninety Six Township.

On the 3rd day of February 1903, more than twenty years after the issue of the bonds and more than six years after the formation of Greenwood County, the people of South Carolina amended the Constitution of their State, (that is the Constitution of 1895), by destroying the corporate existence of certain townships, among them Ninety Six Township,

declaring, "That the corporate existence of said town-"ships be and the same are hereby destroyed, and all "officers in said townships are abolished and all cor-"porate agents removed." (Acts 1903, Vol. 24 Stat. S. C., page 3.)

In their petition for a writ of mandamus against T. A. Graham, County Auditor and J. A. Marshall, County Treasurer of Greenwood County, asking that the one be compelled to assess and the other to collect from all the property situate in what was formerly Ninety Six Township, a sufficient tax to satisfy the said judgment, the petitioners, among things, allege that the Legislature of South Carolina had passed several Acts forbidding, under heavy penalty, the levying and collecting of such taxes by these officers, and that such Acts of the Legislature are in violation of Section 10, Art. 1 of the Federal Constitution.

Section 9, of the Act under which the bonds were issued, provides that "the County Auditor or other "officers discharging such duties, or City or Town "Treasurer, as the case may be, shall be authorized "and required to assess annually upon the property "of said County, City, Town or Townships such per "centum as may be necessary to pay said interest on "said sum of money subscribed, which shall be known "and styled on the Tax Books as Railroad Tax, which "shall be collected by the Treasurer under the same "regulations as are provided by law for the collection "of taxes in any of the Counties, Cities, Towns or "Townships so subscribing."

By their return to the petition, the County Auditor and County Treasurer, among other things, show:

1st. That they are not officers and agents of the Township of Ninety Six; nor of the County of Greenwood; but are officers and agents of the State of South Carolina.

2nd. That they are forbidden by the laws of the State from assessing and collecting taxes for Ninety

Six Township, and have no power and authority to perform the Acts sought to be required of them.

3rd. That the Township of Ninety Six has no existence, no officers and no agents and, therefore, can not levy and collect a tax.

4th. That they have no power, and never have had power, to levy and collect taxes for Ninety Six Township.

The cause was heard before his Honor Judge Pritchard and resulted in a decision in favor of the petitioners, ordering a writ of mandamus to issue commanding the County Auditor and County Treasurer to assess and collect taxes as prayed for in the petition. From this decision they have made the several assignments of error set out in the record which involve the following questions, to wit:

QUESTIONS INVOLVED.

1st. Did the General Assembly have the Constitutional right to impose the assessing and collecting of a tax by the Township on the County Auditor and County Treasurer?

2nd. Did the Legislature, itself, levy the tax?

3rd. If the Legislature did levy the tax, does this not, then, resolve itself into a proceeding against the State of South Carolina, prohibited by the Federal Constitution?

4th. Is the amendment to the Constitution of the State, 1903, whereby the Township was abolished and its officers and agents removed, void as impairing the obligation of a contract?

SPECIFICATIONS OF ERROR.

The assignments of error relied on are fully set out in the Record, but it is not considered essential to repeat them totidem verbis. The following specifications will substantially cover them.

1st. In holding that the General Assembly had the Constitutional right to impose on the County

Auditor and County Treasurer the duty of assessing and collecting a Township tax, when they were not the corporate agents of the Township.

2nd. In holding that the Legislature, itself, levied this tax.

3rd. In holding that a contract entered into by a municipal corporation is a limitation on the reserved power of the State to abolish the corporate existence of said municipal corporation.

4th. In holding that the amendment to the Constitution of the State, 1903, whereby the Township was abolished and its officers and agents removed was void as impairing the obligations of a contract.

5th. In not holding, that if the Legislature levied this tax this is, in effect, a suit against the State and can not be maintained.

6th. In holding that the Constitutional amendment of 1903, whereby the corporate existence of the Township was destroyed and its officers and agents removed, was intended to impair the obligation of a contract and therefore void.

ARGUMENT.

We will not attempt to discuss the assignments of error in the particular order in which they are made, but will discuss them under general heads or subjects which the whole case naturally divides itself into; deeming it more important to show the erroneous result reached by his Honor Judge Pritchard, than to point out the particular errors leading up to that result.

We submit, as a first principle that "The Constitution of 1868" must govern in the construction of the act under which the bonds were issued, and if under that constitution the County Auditor and County Treasurer of Abbeville County had no power to levy and collect this tax as such officers, then, in no event, can that duty be imposed upon the County Auditor and County Treasurer of Greenwood County.

We take occasion here to say that the formation of Greenwood County in 1897 did not in any way alter or change the duties imposed on the County Auditor and County Treasurer of the County in which Ninety Six Township was located.

Judge Pritchard in his decree seems to have thought that the formation of Greenwood County had something to do with these bonds. Greenwood County was formed long before the Township was abolished: and we admit, that if it were the duty of the County Auditor and County Treasurer of Abbeville County to assess and collect these taxes and that duty has not been changed by the amendment to the Constitution of 1903, and if under the law as it then stood and as it now stands, leaving out the question of the constitutional amendment of 1903, those officers could be forced to levy and collect the taxes, had Greenwood County not been formed, then the County Auditor and County Treasurer of Greenwood County can be forced to assess and collect them.

I.

DID THE GENERAL ASSEMBLY HAVE THE CONSTITUTIONAL RIGHT TO IMPOSE THE ASSESSING AND COLLECTING OF A TAX BY THE TOWNSHIP ON THE COUNTY AUDITOR AND COUNTY TREASURER?

That the Township of Ninety Six was a body politic and corporate, was authorized as such to issue the bonds and as such corporation did issue them, is not now questioned, for that has been finally determined by this Court in the case of Folsom vs. Ninety Six Township, 159 U. S., 636, in which case the judgment here sought to be enforced was rendered. There it was held that the Act authorizing the issue of the bonds was constitutional; that the Township was a body politic and corporate, so created by that Act, and that, therefore, the bonds are valid obligations of that Township. But whether the General Assembly had the power under the constitution to delegate

the assessing and the collecting of a tax by the Townships to the County Auditor and County Treasurer was not there discussed. For the purpose of this argument, we admit that the Constitution of 1868 gave the General Assembly the right to vest the Township with power to levy and collect a tax for corporate purposes; we admit that these bonds were issued for corporate purposes; but we do not admit that the power to levy and collect a tax could be delegated to others, than the corporate agents or officers of the Township.

The Act provided, as is set-out in the "Record" (folio 4) that the County Auditor and County Treasurer should perform this duty; but it does not in terms constitute them "the corporate officers" or "agents" of the Township. On the other hand, it provides in express terms, "The County Commissioners "of the respective Counties are declared to be the "corporate agents of the Counties or Townships so "incorporated and situate within the limits of the "said Counties." Vol. 19, Stat. S. C., Page 241, Section 9.

This provision is made in the same section of the Act which provides that the County Auditor shall assess and the County Treasurer collect the taxes.

UNDER THE TERMS OF THE ACT, WHO ARE THE CORPORATE AGENTS OR OFFICERS OF THE TOWNSHIPS?

Are the County Commissioners, so declared by the Act itself, the corporate authorities of the Township; or, are the County Auditor and County Treasurer, on whom certain specific duties are imposed, such corporate authorities? We submit, that the Act must be construed in accordance with its plain meaning, and that it will not be amended by the Court. It declares the County Commissioners to be the corporate agents, and what is said in such plain terms can not receive any other construction; nor can it be contended that the County Auditor and County

Treasurer were also intended by the Legislature to be the corporate officers and agents of the Townships, simply, because a duty is imposed by the Act on those officers. For the Legislature was then declaring who it would constitute officers and agents of the Township; and it would be remarkable, indeed, if in the same section of the Act, almost in the same sentence, that body, naming the particular officers whom it declared to be such corporate agents should intend other officers, also, to be such corporate agents, and on whom it had just imposed certain specific duties, and absolutely fail to say so. Such a construction would supply Legislative intention much beyond anything of the kind the Courts have yet permitted to be done. It would in effect amened the Act and make a new contract to fit the particular case. The principle "ex-pressio unius est exclusio alterius" is peculiarly applicable to the construction of this section of the Act. If the Legislature had intended to make the County Auditor and County Treasurer corporate agents of the Township it could and would have said so, and especially must this conclusion follow, when, almost in the same sentence and in the same Section of the Act, it proceeds to declare what officers shall be corporate agents of the Township.

"Where the language of the Act is explicit there "is great danger in departing from the words used to "give an effect to the law which may be supposed to "have been designed by the Legislature————. It "is not for the Court to say where the language of the "Statute is clear, that it shall be so construed as to "embrace cases, because no good reason can be as-"signed why they were excluded from its provisions."

Denn vs. Reid, 35 U. S. 527.

"What is termed the policy of the government "with reference to any particular legislation is gen-"erally a very uncertain thing, upon which all sorts "of opinions, each variant from the other, may be "formed by different persons. It is a ground much

"too unstable upon which to rest the judgment of the "Court on the interpretation of the Statute."

Haddon vs. Barney, 72 U. S. 111. Bate Ref. Co. vs. Sulzberg, 157, U. S. 37.

Here the terms of the Statute are explicit, its meaning is clear and there is no reason why the Court should depart from its expressed terms, except to make it fit the case at bar. It was probably in the power of the General Assembly to constitute the County Auditor and County Treasurer the Corporate agents of the Township, but the fact that it did not do this, is what we submit to the Court for its consideration. Is the fact that the General Assembly could have made such provision any proof of its intention to have done so?

Judge Pritchard concedes this position in these words, "The County Auditor and County Treasurer "are not officers or agents of the Township in any "sense of the word. In as much as the Acts of 1882 "and 1885 constitute the County Commissioners as "the corporate agents of the Township and at the "same time authorized the County Auditor and Coun-"ty Treasurer to perform duties incident to the as-"sessment and collection of taxes that are separate "and distinct from those assigned to the County Com-"missioners, it can not be contended that the Legis-"lature intended to authorize the Auditor and Treas-"urer to act as Agents of the Township." (Folios 24 and 25 of the "case.")

IF THEY, THEN, ARE NOT CORPORATE AGENTS OF THE TOWNSHIP, WE SUBMIT THEY HAVE NO POWER UNDER THE CONSTITUTION OF 1868 OR THAT OF 1895 TO LEVY AND COLLECT THE TAXES REQUIRED OF THEM BY THE WRIT OF MANDAMUS AND, THEREFORE, THE WRIT OUGHT NOT TO HAVE ISSUED.

Article 9 of the Constitution of 1868, entitled "Finance and Taxation" sets forth the whole system of taxation in the Stae of South Carolina. Section

8 of this Article provides, "That the corporate au-"thorities of Counties, Townships, School Districts, "Cities, Towns and Villages may be vested with pow-"er to assess and collect taxes for corporate pur-"poses ————." This is the only provision in that Constitution made for the levying of a tax by any municipal body. The same provision is made by the Constitution of 1895 with this further limitation and restriction on the power of such municipal corporations to levy and assess taxes, to wit: "For educa-"tional purposes, to build and repair public roads, "buildings and bridges, to maintain and support pris-"oners, to pay jurors, County officers and for litiga-"tion, quarantine and Court expenses and for ordi-"nary County purposes, to support paupers and pay "past indebtedness."

Art. 10, Section 6 Constitution 1895.

It has been held by this Court that a tax for the building of a railroad is a tax levied for a corporate purpose of this Township. We submit, however, that the power to levy and collect such tax can only be vested in the "corporate authorities" of the Township. "The corporate authorities" of the county can not be vested with power to assess and collect a tax for Township purposes, nor vice versa. That power can only be delegated to the authorities of the body contracting or about to contract the debt.

These bonds were held valid by this Court in Folsom vs. Ninety Six, 159 U. S., 628, for the reason, says the Court, "To aid in the building of a railroad "is a public purpose, and being for the general welfare "of the ordinary municipal corporations such as "Counties, Cities and Towns through which the road "is to pass, is a corporate purpose, within the mean-"ing of a constitutional provision vesting in the Leg-"islature with power to authorize municipal corpora-"tions to assess and collect taxes for corporate pur-"poses."

We particularly call the attention of the Court

to its language quoted above. The bonds were held valid because the railroad was a corporate purpose of the township and, therefore, under this constitutional provision "the corporate authorities" of the Township might be vested with power to assess and collect a tax to discharge the obligations. The decision lays down this doctrine clearly, if not ipso verbis, certainly in substance, that for no other reason could the bonds be held valid, except that they were for a corporate purpose for which "the corporate authorities" of the Township might be vested with power to assess and collect a tax. The question whether or not the "corporate authorities" of the Township were actually vested with this power was not decided by the Court, because that question did not arise in the case. The only question there, was as to the validity of the bonds. Ninety Six Township is not now before the Court. Its rights in this litigation have already been concluded. The question now before the Court is, Can the Auditor and Treasurer, State officers, as we will hereafter show them to be, or if you please, County officers, be made to assess and collect a tax, the power to do which can, under the constitution of the State and the decisions of this Court, be delegated only to "corporate authorities" of the Township?

We submit, in issuing his writ against these officers, Judge Pritchard has disregarded the provisions of the Contitution and has, in effect, undertaken to exercise the high power of taxation in violation of the injunction of both State and Federal Constitution. That the bonds are valid, that the "corporate authorities" of the Township may be vested with power to assess and collect a tax to discharge them, we admit. We do say, however, that the Auditor and Treasurer are not such "corporate authorities" that the power to assess and collect this tax has never been delegated to "the corporate authorities" of the Township, that the General Assembly of the State can so

delegate it whenever it chooses to, and that the petitioners must go to that body and not to the Courts to have that power delegated.

In Heine vs. Levee Comm., 19 Wall, 655, the Court says: "The power we are here asked to ex-"ercise is the very delicate one of taxation. This pow-"er belongs in this country to the Legislative Sover-"eignty, State or National. In the case before us, "National Sovereignty has nothing to do with it. The "power must be derived from the Legislature of the "State. So far as the present case is concerned, the "State has delegated the power to the Levee Com-"missioners. If that body has ceased to exist the "remedy is in the Legislature, either to assess the "taxes by a special taxation or to vest the power in "some other Tribunal. It certainly is not vested as "in the exercise of an original tribunal in any Federal "Court. It is unreasonable to suppose that the Leg-"islature would have selected a Federal Court "for that purpose. It is not only one of the "inherent powers of the Court to levy and collect "taxes but it is an invasion by the judiciary of the "Federal government of the Legislative functions of "the State government. It is a most extra-ordinary "request and a compliance with it would involve con-"sequences no less out of the way of judicial pro-"cedure, the end of which no wisdom could foresee." See Merryweather vs. Garrett, 102, U. S., 498, where the same doctrine is announced.

Judge Pitchard sees the result of the position as above set forth and rightly concludes that the Auditor and Treasurer are not "the corporate agents" of the Township and that "it can not be contended that the "Legislature intended to authorize the Auditor and "Treasurer to act as agents of the Township," and he goes on to say, "the County Auditor and Treasurer "are authorized and empowered to do that which may "be lawfully done independent of the corporate exist-"ence of the Township," which is, it seems to us, di-

rectly holding that the Legislature may vest others than "the corporate authorities" of the Township with power to levy and assess a tax for corporate purposes. This is exactly what the Constitution does not authorize. It is a declaration of what he thinks the Constitution should be—not what it is. His construction allows the Legislature to vest the power to levy and assess a tax for the Township on whatever persons that body sees fit to vest that power in. The Constitution intended to restrict the Legislature, and not to give it unlimited discretion.

But for the purposes of this argument, conceding that Judge Pritchard meant not what he has said, to wit: That the Legislature delegated the power to assess and collect the taxes to these officers; but that the Legislature itself made a levy of taxes on the Township and the Auditor and Treasurer were made the agents of the Legislature to perform the duties incident to the collection of that tax, our answer is twofold; First, As a matter of law and fact the Legislature did not levy a tax; Second, If it did levy a tax, then this is a suit against the State of South Carolina which is prohibited by the Federal Constitution.

II.

DID THE LEGISLATURE LEVY A TAX?

The language of the Act, under which the bonds were issued and under which it is contended that the levy was made, is set out in the "case" at folio 4. "That for the payment of the interest on such bonds "as may be issued by said Counties, Cities, Towns or "Townships the County Auditor or other officers dis- "charging such duties or the City or Town Treasurer, "as the case may be, shall be authorized and required "to assess annually upon the property of said County, "City, Town or Townships such per centum as may be "necessary to pay the interest of said sum of money "so subscribed, which shall be known and styled on "the Tax Books as Railroad Tax, which shall be col-

"lected by the Treasurer under the same regulations "as are provided by law for the collection of taxes "in any of the Counties, Cities, Towns or Townships "so subscribing and which shall be paid over by the "Treasurer to holders of said bonds as said interest "shall become due on presentation of the coupons," etc.

This section, we submit, does not purport to levy a tax. It has none of the incidents necessary to the levying of a tax. At the time of the passage of the Act no bonds had been issued. It was not known what County, Town or Township would issue bonds. The amount for which the bonds were to be issued was not determined. No rate of taxation is attempted to be fixed, no obligation is created against the Township, no provision is made for the valuation of the property to be taxed. In fact, nothing is done by this Act which lends to it anything in the nature of a tax levy. On the contrary, it in express terms delegates the power, for its provisions are that the County Auditor and Treasurer "SHALL BE AUTHORIZED AND REQUIRED" THE ONE TO ASSESS AND THE OTHER TO COLLECT SUCH TAX.

It uses the exact terms of the constitution, "assess" and "collect." The Constitution provides that this power may be vested in the "corporate authorities" of the Township. The acts vests exactly that power, "to assess and collect" in others than the "corporate authorities."

In Railroad Company vs. Kay, 62 S. C., 32, quoting and reaffirming the doctrine laid down in Morton-Bliss & Co. vs. Controller General, 4 S. C., 430, the Court says: "Three things are essential to a tax, as "the term is understood by our Constitution, First, "The ascertainment of a sum certain or that can be "rendered certain to be imposed on the collective "body of taxes payers; Second, A legal imposition "of that sum as an obligation on the collective body "of tax payers; Third, An apportionment of such sums

"among individual tax payers so as to ascertain the "part or share that each would bear ————.

"The first two Acts above described, namely, The "ascertainment of a sum to be imposed on the collec- "tive body of tax payers, and its imposition by a leg- "islative declaration to that effect are essentially "legislative Acts or Acts properly directed to the "law making functions of the government. The third "Act, namely, the apportionment of a whole sum im- "posed by way of taxation on the collective body of "tax payers upon separate individuals composing that "body, is usually an administrative act performed "under specific statutory directions, ascertaining the "mode and time of its performance——. When the "aggregate valuation of property is ascertained at the "time the tax levy is ordered, the Legislature freq- "uently makes a division, and directs the levy to be "made according to the resulting rate, which is thus "established by law instead of merely fixing the "amount to be levied, and leaving the rate to be "ascertained by computation after the aggregate val- "uation of property, subject to taxation is ascertained "and known. Both nodes are resorted to and both "are equally appropriate to adoption by the legisla- "tive body. As there are two distinct stages in this "proceeding the result of one of which is to fix an in- "debtedness on the collective body of tax payers and "the other on the individual tax payer, so the word "'levy' is indifferently employed, as commonly used, "to express either one of these proceedings separate- "ly, or both collectively. A tax is said to be levied "when the amount or the rate to be imposed is fixed "by law; for what is wanting to complete such levy "is supplied by standing tax law and consists in a "course of administrative Acts. When the levying of "a tax is spoken of as a legislative Act, it is com- "monly understood to describe such action on the part "of the Legislature as would with the standing law "complete the legislative authority requisite to enable

"the Legislative department to distribute and collect "the tax———. In other words, the tax directed to "be levied must be so far imposed in order to comply "with the letter and spirit of the Constitution that no "further legislation will be necessary to enable its "collection."

The act in question makes no attempt to fix a sum certain on any body of tax payers nor a sum that can be rendered certain. The words, "such per centum as may be "necessary to pay the said interest" is not a sufficient compliance in this respect. The is not a sufficient compliance in this respect. The terms used in the Act are uncertain as to the body on which it is to be imposed, uncertain as to the time when it is to be imposed. It is not possible from the words of the Act itself to render certain any of these things. The Act does not fix the aggregate value of the property. It makes no division—one of the modes recognized—nor does it fix a sum to be imposed on the collective body of tax payers, leaving the rate to be ascertained by computation—the other mode recognized. As a matter of fact the whole purport of the Act is to allow certain municipal bodies, therein named, to contract debts under certain restrictions and conditions. And it would, we submit, be an absurd and an extraordinary conclusion to reach, that the Legislature intended by this Act to levy and assess a tax when at the time there was no purpose for which the tax was to be levied and collected. At that time the Townships were not corporate bodies but were created such by this particular Act. Therefore, they had no debts whatever upon them for which a tax could or should be levied.

In State vs. Neely, 30 S. C., 604, the Court held that the Legislature had power to levy a tax and we do not question that power. "So to it seems to be "settled by the weight of authority that he Legisla- "ture may not only delegate this power of levying "taxes to aid in the construction of a railroad to

"municipal corporations but may also by the exercise "of its original power of taxation directly impose "such taxes upon any territorial divisions of the State———." The Court was construing the Acts of 1888, Vol. XX, Stat. at Large, page 12. In this case, the bonds had already been issued at the time of the passage of the act in question, and the act declared that these bonds were debts of the Township, and in thus declaring them to be debts of the Township it imposed a sum certain on the collective body of tax payers, after which the rate of taxation was but a matter of calculation.

State vs. Whitesides, 30 S. C. 584 is another of the cases where the tax is directly imposed by the Legislature.

In the case now before the Court, at the time of the passage of the act there was no debt. The bonds had not been issued, the Act itself created no obligation whatever, but vested the power to create a debt in the Township. At that time there was no object for which a tax might be levied.

In State vs. Neely, Supra, this difference in the two Acts is recognized in these words, speaking of the right of the Legislature to levy a tax and its right to delegate that power, "bearing these distinc- "tions in mind, it must be obvious that when this "Court decided in Floyd vs. Perrin, Ante 1, that the "purporting to delegate power to a Township to levy "a tax for a purpose other than a corporate purpose "was unconstitutional, it did not touch the question "whether the Legislature might not, by the exercise "of its own power, impose a tax for the same purpose "for which it had without constitutional authority "attempted to delegate the power to certain Town- "ships."

In Folson vs. Ninety Six Township, 159 U. S., 627, this Court puts its decision on the ground that the railroad was a corporate purpose and therefore the Constitution gave the Legislature the right to del-

egate to the Township the power to assess and collect a tax for the purpose of aiding in its building. The Court declares that the power to tax is delegated, and that the right to delegate that power is within the provisions of the Constitution and, therefore, valid. Discussing State vs. Neely and State vs. Whitesides, supra, this language is used, "as the debt thus "held to be imposed upon the Townships by the Act of "1888 was the debt represented by the bonds issued "under the Act of 1885; as the tax for the payment "of that debt under the new act was to be levied upon "the property of the Township by County officials, in "substantially the same manner, as under the earlier "Statutes; and as the Constitution of the State did "not authorize the Legislature, with or without the "consent of the Township, to vest its corporate au-"thorities with power to assess and collect taxes for "any but corporate purposes, it is not easy to under-"stand how the later tax could be held constitutional, "while the earlier was held unconstitutional."

Therefore, it is respectfully submitted that the Legislature did not levy a tax under this Act. The Act does not contain the necessary requisites to a tax levy. The State Court and the Federal Court are in accord in this view, both of them holding in effect that the Act does not levy a tax. The only difference between the two Courts, is that the State Court held held that the Act delegated the power to levy and assess a tax which was not for a corporate purpose, while the Federal Court held that it was for a corporate purpose.

It is, therefore, submitted, that the writ of mandamus should not have issued, on the theory that the tax was levied by the Legislature, for, we think, it is already demonstrated that no such levy has been made by that body.

III.

THIS IS A PROCEEDING AGAINST THE STATE OF SOUTH CAROLINA.

If, however, the Court agrees with Judge Pritchard and holds that the Act was, in effect, a levy of a tax by the Legislature and that the Auditor and Treasurer are the agents of the Legislature for the purpose of carrying out the administrative parts of its levy; then, we submit, this proceeding is a proceeding against the State of South Carolina and can not be maintained, because it falls within the inhibition of Article XI of the Federal Constitution.

The petition in this case shows that the Legislature passed several Acts forbidding these officers from attempting to assess and collect the taxes (folio 5 of the "case.") These officers have no interest in this litigation,—they are not the real parties in interest. These facts appear not only in the petition, but are set out in the return. They are not only the officers named in the Act to assess and collect the taxes, therefore, as contended by petitioners, legislative officers, but are in fact State officers, commissioned by the Governor of the State.

"The Governor is authorized by and with the "advice and consent of the Senate to appoint for each "County in the State a County Auditor." Section 339 Civil Code Vol. 1.

"The Governor is authorized by and with the advice and consent of the Senate to appoint for each "County in the State a County Treasurer." Section 292 Civil Code, Vol. 1.

This proceeding, therefore, is an effort to make the State of South Carolina carry out what the petitioners contend was her agreement. As Judge Pritchard puts it, "The officials chosen by the Legislature "as instrumentalities for the assessment and collection of the tax are in existence and it is the duty of "the Court to compell the enforcement of the same. ————."

"In Christian vs. Atlantic & N. C. R. R. 133 U. S. 233 the Court uses this language, "The mortgagee's "right against the State may be just as good and "valid, in a moral point of view as if it were against "an individual. But the State can not be brought into "Court or sued by a private party without its consent." Citing a number of cases.

"Good public reasons, founded on the distribution "of powers in constitutional government, make the "power to compel States to pay their money obliga- "tions political and not judicial."

Hans vs. State of Louisiana, 24 Fed. Rep. 55.

"A Federal Court can not take jurisdiction of "a suit against a State officer to compel or coerce the "State to perform its obligations or abide its con- "tracts."

Yale College vs. Sanger, 62 Fed. Rep. 177.

In the case of In Re Ayers, 123 U. S., 433, "In "this spirit, it must be held to cover, not only suits "brought against a State by name, but those also "against its officers, agents and representatives, where "the State, though not named as such, is, neverthe- "less, the only real party against which alone, in fact, "the relief is asked, and against which the judgment "or decree effectively operates."

In Rolston vs. Missouri Fund Commissioners, 120 U. S. 411, the Court lays down the distinction between a suit against the State and one against the officers of the State, in these words, "It is next con- "tended that this suit can not be maintained because "it is in effect a suit against the State, which is pro- "hibited by the Eleventh Amendment of the Consti- "tution of the United States, and Louisiana vs. Jum- "mell 107 U. S. 711 is cited in support of this position. "But this case is entirely different from that. There "the effort was to compel a State officer to do what "a Statute prohibited him from doing. Here the suit "is to get a State officer to do what a Statute re- "quires of him. The litigation is with the officer, not

"the State." This language has direct application to the facts of the case at bar. If the County Auditor and County Treasurer, as such, were not constituted by the Act the "corporate authorities of the Township," and it is conceded that they are not, then they are officers of the State, not only by virtue of their appointment as such by the Governor, by and with the advice and consent of the Senate, but especially made the representatives of the State, or more correctly of the Legislature, to assess and collect this tax. The State has forbid them under heavy penalty from assessing and collecting this tax, so says the petition upon which this writ is asked; They have no interest in this litigation; the State, their Master, has commanded them not to act; the Courts are asked to make them disobey Her commands. The facts are practically the same as those of the case of Louisiana vs. Jummell 107 U. S., 711, where an Act of the Legislature, and an amendment to the Constitution provided for the issue of bonds in exchange for outstanding bonds, and for the assessment and collection of a tax to meet the same. Thereafter further legislation was had which in effect forbid "the payment of interest due January" and withdrew from the officers the means to carry the original contract into effect; in a proceeding to mandamus these officers, the Court held, "That the execution of the contract can not be enforced, nor the relief sought be awarded, in a suit "to which she (the State) is not a party, but which is "brought against officers, who are merely obeying the "positive orders of the Supreme political power of the "State."

In Hagood vs. Southern 117 U. S., 52, the Court declares, "When a suit is brought in a Court of the "United States against officers of a State to enforce "performance of a contract made by the State, and "the controversy is as to the validity and obligation "of the contract, and the only remedy sought is the "performance of the contract by the State, and nom-

"inal defendants have no personal interest in the sub-
"ject matter of the suit, but defend only as represent-
"ing the State, the State is the real party against
"whom the relief is sought and the suit is substan-
"tially within the prohibition of the XI Amendment
"of the Constitution of the United States, ————.
"If this is not within the class of those forbidden by
"the Constitutional guarantee to the States of im-
"munity from suits in Federal tribunals, it is diffi-
"cult to conceive the frame of one which would be.
"If the State is named as a defendant, it can only be
"reached either by mesne or final process through its
"officers and agents and a judgment against it could
"neither be obtained nor enforced, except as the pub-
"lic conduct and government of the ideal political
"body called a State could be reached and affected
"through its official representatives. A judgment
"against these latter, in their official and represen-
"tative capacity, commanding them to perform offi-
"cial functions on behalf of the State according to
"the dictates and decrees of the Court, is, if any thing
"can be, a judicial proceeding against the State itself."

The relief sought in this case, is a command from the Court to do that which the State has forbidden. The relief sought is affirmative and in this lies the real distinction between a suit against the State and a suit against its officers. An officer, it is admitted, can not invoke a void Statute as a defense to his conduct under its authority; but it is submitted a Court can not command him to do that which is forbidden by Statute, even if the Statute is void. This is the doctrine the Court declares, in Pennoyer vs. McConnaughy, 140 U. S. 1., in which all of the decisions heretofore rendered on the question were adhered to, "the
"dividing line between the cases to which we have
"referred and the class of cases in which it has been
"held that the State is a party defendant, and there-
"fore not suable, by virtue of the inhibition contained
"in the Eleventh Amendment to the Constitution was

"adverted to in Cunningham vs. Macon & B. R. Co., "where it was said, referring to the case of Davis vs. "Gray, 'nor was there in that case any affirmative re- "lief granted by ordering the governor and land com- "missioners to perform any act towards perfecting "the title of the Company.' 109 U. S. 453, 454. Thus "holding, by implication, at least, that affirmative re- "lief would not be granted against a State officer by "ordering him to do and perform acts forbidden by "the law of his State, even though such law might be "unconstitutional."

The same distinction was pointed out in Hagood vs. Southern, which was held to be in effect a suit against the State, and it was said "A broad line of "demarkation separates from such cases as the pres- "ent, in which the decrees require, by *affirmative offi- "cial action* on the part of the defendants, the per- "formance of an obligation which belongs to the State "in its political capacity, those in which actions at "law or suits in equity are maintained against de- "fendants who, while claiming to act as officers of "the State, violate and invade the personal and prop- "erty rights of the plaintiffs, under color of author- "ity, unconstitutional and void."

We deduce from these decisions, this principal, applying it to the facts of this case. If the County Auditor and County Treasurer are not corporate authorities of the Township, they are, ex necessitate, State officers; they are obliged to be the one, or the other; if they are State officers, this proceeding can not be had against them, for the relief sought is to require of the State the performance of her contract, that is, the enforcement of the provisions of a Statute authorizing and directing the County Auditor to assess and the County Treasurer to collect certain taxes which duties the State by a subsequent Statute has forbidden them "under heavy penalty" to perform; And, for sake of argument, admit that the last named Statute is unconstitutional and therefore void, the

relief asked against the officers is *"affirmative official action,"* which the political body of which they are the mere servants has forbidden them to exercise, therefore, say they Court, the petitioners must seek to have the Master and not the servants, direct the performance of such duties, and the Master in this case being a Sovereign State, the Federal Courts can not coerce her to the performance of such duties; whether they be morally or legally right or wrong the judiciary is not allowed to say, much less to commend the performance of them. If the officers were about to take some affirmative action under a void Statute, which would injure petitioners in person or property, the case would be different, and the Court could prevent such action; but here the officers are not about to act, they are attempting to do nothing; they are simply obeying the mandates of the State, by refraining from doing that which the State has said they must not do; and the relief sought is not to prevent them from acting under a void Statute to the injury of petitioners, but to make them perform a forbidden duty, thus, in effect, making a Sovereign State perform what petitioners contend is Her contract with them, by this indirect action against her. The Constitution, under the constructions of this Court, inhibits the doing of this by indirection as well as by direction.

Therefore, it is submitted, the decree of Judge Pritchard must be reversed.

IV.

THE CONSTITUTIONAL AMENDMENT.

Assuming, for the purpose of this argument, that the Act under which the Bonds were issued intended that the County Auditor and County Treasurer be made the "Corporate Authorities" of the Township, for the performance of the specific duties therein imposed upon them (a position which we think has been clearly shown to be untenable under the express terms of the Act, yet the only logical position on which a writ of mandamus can issue against these officers) our

answer is, that by the amendment to the Constitution of the State the Township has been abolished as a corporate entity and its corporate officers and agents have been removed, and therefore, if the County Auditor and County Treasurer were ever the "Corporate Authorities" of the Township, they are not such "Corporate Authorities" now, and a writ of mandamus should not issue against them to make them discharge the duties of such "Corporate Authorities."

On this theory, it will be admitted, and if it is not admitted, it is too evident to need argument to support it, that the writ can only issue in the event that the Constitutional Amendment is void and is without force and effect. It will be contended that this Amendment is in violation of the Federal Constitution. Judge Pritchard, in part, rest his opinion on that conclusion, saying, "It cannot be doubted that "the constitutional amendment of 1901, was intended "to impair the means provided by law for the pay-"ment of these bonds, to this extent it is obnoxious "to Article I, clause 10 of the Constitution of the "United States," but as if not feeling secure on this ground, the Eminent Judge who heard the case takes the further position that the means provided by law for the payment of these bonds is still in existence and "it is the duty of the Court to compel the en-"forcement of the same irrespective of the result of "any attempt which may have been made to abolish "the Township." These two positions are, to our minds, irreconcilable. They are entirely inconsistent. They are the exact opposites of each other. In one sentence it is declared that the Township still exists and, therefore, the writ will issue against its officers and agents; in a following sentence it is declared that these officers are not and never were the "Corporate Authorities" of the Township but that the writ should issue against them because the Legislature had delegated to them the power to assess and collect taxes for the purpose of paying the bonds, and

this, nothwithstanding the provisions of the State Constitution declaring that that power shall be delegated only to "Corporate Authorities." However, this Court will not reverse the judgment of Judge Pritchard unless the result reached by him is wrong, no matter upon what theory this result was reached. We have already tried to point out the fallacy of the last named position, and think that we have clearly demonstrated that the writ can not issue from that view point of the case.

The first named theory, that the constitutional amendment is obnoxious to the Federal Constitution is, we submit, equally as fallacious. It is not, we think, supported either by reason or authority. We admit the general proposition that a State has no right to pass any law which is intended to impair the obligation of a contract, and it makes no difference whether that law is passed by its Legislative body or by the people of a State in the adoption of a Constitution, if directed at a contract so as to impair its obligation, such law is void. We do not admit, however, that the existence of any contract can defeat and destroy the right in a State to exercise plenary power over the municipal corporations which it has created; no contract can take away from the State the right to alter, amend or destroy such corporations. The fact that the State has authorized such corporations to contract debts, does not deprive the State of its control over such corporations. Simply because the destroying of the corporate existence of the Township and the removal of its officers and agents might have the effect of rendering the obligations of such Township worthless, would be hardly sufficient to declare such action of the State void, for that would render the policy of local government of a Sovereign State subversive to the claims of the creditors of the Township. A result, not only, not supported by precedent, but a dangerous infringement upon the well established principles of our Govern-

ment. When the holders of these bonds purchased them, they purchased with the condition that they were subject to the paramount right of the State to repeal the charter of the Township. This provision became as much a part of the contract as if it had been written across the face of the bonds. The holders of the bonds had notice that what has been done might be done, because this right in the State to repeal the charter of the Township was the law which must be read into the contract as a part of it. They chose to accept the risk, and it does not, therefore, lie in their mouths to question the action of the State or its motives in destroying the Township. The obligation of their contracts is the same it has always been. No alteration has been made in its terms. A contingency has happened, which the holders of the bonds assumed would not happen, but of which they had knowledge, by imputation of law, might happen. The State has exercised an unquestionable right.

Judge Pritchard, we submit, and with the utmost respect for his opinion in the matter, has, without consideration of this reserved and paramount right in the State, without any indication from the words and letter of the amendment as to what was the intention of the Legislature and the people of the State in adopting and passing it, without any showing of fact as to what the intention was, declared that the people of a Sovereign State, its Legislative body, in fact the State itself, intended this amendment to impair the obligation of the contracts of the Township. Upon what facts he predicates this conclusion he does not state; for what reasons he imputes bad motives to the Legislature of the State he does not show; where he finds the facts upon which he declares that the people of South Carolina intended to impair the obligation of the Contracts of Ninety Six Township his opinion is silent. But, be the intention of the State, its Legislature and its people, whatever Judge Pritchard may choose to conclude it with that, we submit, this

Court has nothing to do. The question for determination is, DID THE STATE EXERCISE A POWER WHICH IT HAD A RIGHT TO EXERCISE? If it did, no matter what the motive which moved it, no Court, State or Federal, has the right to enquire or interfere.

In Amy vs. Watertown, 130 U. S. this Court declares, "With motives we have nothing to do. Cer-"tainly, improper motives can not be attributed to a "State Legislature in the passage of any laws for the "government of the State. Individuals may be actu-"ated by improper motives, and may take advantage "of defects and imperfections of the law for the pur-"pose of defeating justice. ————The State has "plenary power over its municipal corporations, to "change their organization, to modify their method of "internal government, or to abolish them altogether. Contracts entered into with them by private parties "can not deprive the State of this paramount author-"ity."

Judge Pritchard holds the exact contrary of this authority. The logical effect of his decision, and so expressed by him, is that the State had no right to abolish the Township because of the contracts entered into by the Township with these bond holders.

In Atkins vs. Kansas 191 U. S. 220 we find this language, "These questions—indeed, the entire argu-"ment of defendants counsel—seem to attach too lit-"tle consequence to the relation existing between a "State and its municipal corporations. Such corpora-"tions are creatures, mere political subdivisions, of "the State for the purpose of exercising a part of its "powers. They may exert only such powers as may "be necessarily implied from those granted. What "they lawfully do of a public character is done under "the sanction of the State. They are, in every essen-"tial sense, only auxiliaries of the State for the pur-"pose of local government. They may be created, or "having been created, their power may be restricted

"or enlarged, or altogether withdrawn at the will of "the legislature; the authority of the legislature, when "restricting or withdrawing such powers, being sub- "ject only to the fundamental condition that the col- "lective and individual rights of the people of the mu- "nicipality shall not thereby be destroyed."

See also, Rogers vs. Burlington 3 Wall 654-663.
United States vs. R. R. 17 Wall 322
Mount Pleasant vs. Beckwith 100 U. S. 514
State Bank vs. Ohio 16 How. 369
Hill vs. Memphis 134 U. S. 198
Barrett vs. Dennan 145 U. S. 135
Williams vs. Egglestein 170 U. S. 304

One of the latest declarations of the Court is found in Shapleigh vs. San Angelo, 167 U. S. 654. "The "conclusions reached by this court may be thus ex- "pressed: The State's plenary power over its munici- "pal corporations to change their organization, to "modify their method of internal government, or to "abolish them altogether, is not restricted by con- "tracts entered into by the municipality with its cred- "itors or with private parties. An absolute repeal of "a municipal charter is therefore effectual so far as "it abolishes the old corporate organization;————."

New Orleans vs. Benjamin, 153 U. S. 411 substantially the same doctrine is laid down.

In Merriweather vs. Garrett 102 U. S. 472 the majority of the Court, through Mr. Justice Feild puts the doctrine in this language, "The right of the State "to repeal the charter of Memphis cannot be ques- "tioned. Municipal corporations are mere instrumen- "talities of the State for the more convenient admin- "istration of local government. Their powers are "such as the Legislature may confer, and these may "be enlarged, abridged or entirely withdrawn at its "pleasure. This is common learning, found in all ad- "judications on the subject of municipal bodies and "repeated by text writers. There is no contract be-

"tween the State and the public that the charter of a "City shall not be at all times subject to Legislative "control. All persons who deal with such bodies are "conclusively presumed to act upon knowledge of the "power of the Legislature. There is no such thing "as a vested right by any individual in the grant of "Legislative power to them. United States vs. R. R. "Co. 17 Wall 322,———By the repeal the Legislative "powers previously possessed by the corporation of "Memphis reverted to the State." At page 515 the "Court further says, "So long as the law authorizing "the tax continues of force, the courts may, by man- "damus, compel the officers empowered to levy it or "charged with its collection, if unmindful and neg- "lectful in the matter, to proceed and perform their "duty; but when the law is gone, and the office of the "collector abolished, there is nothing upon which the "courts can act."

In the case of Wolfe vs. New Orleans 103 U. S. 358, where the court holds, "As long as a city exists, "laws are void which withdraw or restrict her taxing "power so as to impair the obligation of her contracts "made upon a pledge expressly or impliedly given "that it shall be exercised for their fulfillment," cit- ing and approving the doctrine laid down in Von Hoff- man vs. Quincey, 4 Wall 535, the case of Merriweather vs. Garrett is reviewed and the doctrine laid down there reaffirmed, as follows, "These views are not in- "consistent with the doctrine declared by the decis- "ion of the Court in the recent case of Merriweather "vs. Garrett, 102 U. S. 472. There the charter of the "City of Memphis had been repealed and the State "had taken the control and custody of her public porp- "erty, and assumed the collection of the taxes pre- "viously levied and their application to the payment "of her indebtedness. The question considered, there- "fore, was whether the taxes levied before the repeal "of the charter, but not paid, were assets "which the court could collect through a re-

"ceiver and apply upon judgments against the "city."

So, then, it is settled in an unbroken line of decisions by this Court that a State has a reserved, indisputable right to repeal the charter of municipal corporations created by it, to destroy them; and this right is not restricted on account of any obligations which might have been contracted by the municipality. As one of the cases puts it, "there is no such thing as a vested right by any individual in the grant of Legislative power to them." The exercise of this right by the State is not open to question by those who have made contracts with the municipality. Their contracts are subject to the exercise of this right by the State. What moves the State to the exercise of the right, what reasons induced it, what circumstances made it politic are not for the Courts to inquire into. If it had been open to conjecture and opinion, the Courts would in all probability have said, in the long line of cases which have been before it on the question, that the Legislative action in each case was brought about by reason of the fact that the municipality had contracted debts which it was not able to pay; that fact may afford the strongest reason why the powers given to the municipality should be taken from it, that it may be prevented from continuing in a course which is ruinous to its citizens. So long as the Legislative action is not directed in express terms at the particular contracts, it cannot be said that the intention of the Legislature was to impair the obligation of the contract.

In the case of Muma vs. Potomac Co., 8 Peters 287 it was held that the dissolution of a private corporation by the Legislature of the State of Virginia did not impair the obligations of the contracts of that corporation, because, says the court, "A corporation. "by the very terms and nature of its political exist- "ence, is subject to dissolution by a surrender of its "corporate franchises and by a forfeiture of them for

"wilful mis-use and non-use. Every creditor must "be presumed to understand the nature and incidents "of such a body politic and to contract with reference "to them. And it would be a doctrine, new in the law, "that the existence of a private contract of a corpora- "tion should force upon it a perpetuity of existence "contrary to public policy, and the nature and object "of its charter."

See also U. S. vs. B. & O. R. R. 84 U. S. 335.

Williamson vs. New Jerseey 130 U. S. 189.

THE CONSTITUTION OF THE STATE RESERVES THE RIGHT TO REPEAL THE CHARTER OF ALL CORPORATION CREATED UNDER IT.

Besides this long line of decisions by the Supreme Court of the United States, holding upon the general principles under which our government is established, that the State has at all times the right to repeal the charters of municipal corporations created by it, in the State of South Carolina that right was IN EXPRESS TERMS reserved under the Constitution then and now of force. It is provided in the Constitution of 1868 Art. 12 Section I "Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed." Long prior to this, as far back as the year 1841, it has been the law of South Carolina, that it shall be deemed a part of the charter of every corporation that it shall at all times be subject to alteration, amendment or repeal. II Stat. S. C. 183. In Hoge vs. R. R. 99 U. S. 348 the United States Supreme Court construing this statute, "That every charter, amended or modified, is subject to repeal, amendment or modification. Such is evidently the meaning of the 41 section of that law, though the intention is inaptly expressed."

See also Railway Company vs. Gibbes 27 S. C. 395 for the same construction.

V.

THE DOCTRINE OF UNITED STATES VS. QUINCEY 71 U. S. 535.

There is a class of cases in which the doctrine announced apparently seems to conflict, with that of Merriweather vs. Garrett, and other cases cited The leading one of these is United States vs. Quincey, 71 U. S. 535, where it is said, "It is equally clear that "where a State has authorized a municipal corpora- "tion to contract and to exercise the power of local "taxation to the extent necessary to meet its engage- "ments, the power thus given becomes a trust which "the donor cannot annul, and which the donee is "bound to execute; and neither the State nor the cor- "poration can any more impair the obligation of the "contract in this way than in any other."

The facts in that case were, that the relator was the owner of certain bonds and coupons of the City of Quincey. When the bonds were issued, the act under which they were issued, FORMING A PART OF THE CONTRACT, provided for the levy and collection of a certain tax to pay them, and the Legislation discussed, and by the court held to be in violation of the Federal Constitution, was an Act limiting the power of the City of Quincey to levy and collect taxes to an amount which rendered it impossible for the City to discharge the obligation, thus impairing the obligation of that City's contract. The legislation did not purport to be an amendment, alteration or repeal of the charter of the City; but on its face the object of it appeared to be, to put it beyond the power of the City to discharge an obligation which the Legislature had authorized it to contract. In discussing the case and the precedents upon which the doctrine was based, the Court declares what kind of legislation the doctrine is applicable to, "This has ref- "erence to legislation which affects the contract DI- "RECTLY, and not incidentally or only by conse- "quence."

Of the same class of cases, is Hicks vs. Cleveland 106 U. S. 464, where the Court declared void the legislation of the State of South Carolina which prohibited the officers charged with that duty from levying and collecting taxes to discharge obligations created by a Township under Legislative authority.

There is a long line of decisions following, affirming and declaring the doctrine laid down in United States vs. Quincey. We do not pretend to contest this doctrine, for it is too well established. But is it applicable to legislation of the kind now before the Court? We do not think it is. If it is applicable, then, indeed there is conflict in the two lines of decisions by the Court. The doctrine laid down in Merriweather vs. Garrett, and cases cited in support of the principles there laid down, are as well established, as thoroughly incontrovertable, and as firmly fixed in the law of the land, as that laid down in United States vs. Quincey. Therefore, there must be a well defined distinction, and to our minds that distinction is clear; they are not in the least inconsistent, or irreconcilable, but go hand in hand, when this distinction is taken into consideration. United States vs. Quincey tells us what the difference is, in these words, "This "has reference to legislation which affects the contract "Directly, and not INCIDENTALLY OR ONLY BY "CONSEQUENCE."

In Mobile vs. Watson 116 U. S. 305, the Court recognizes the doctrine of United States vs. Quincy, and reaffirms it; yet the Court does not question the effect of a statute which destroys the corporate existence of the City of Mobile. It declares that the municipal corporation, City of Mobile, is gone; but holds that the corporation succeeding to its territory, etc., is liable for its obligations.

This is the distinction, which we think is clearly recognized. The State reserves to itself the right to amend, alter or repeal the charters of all municipal corporations created by it. When third parties deal

with the corporation, WRITTEN IN THEIR CONTRACTS, is this reserve power of the State. The State can not alter amend or repeal those provisions made by it allowing the municipality to contract a debt, by taking away the power vested in the municipality to discharge the debts, because such legislation is ON ITS FACE DIRECTED AT THE CONTRACT, and impairs its obligation. But when a State chooses to exercise its right to alter, amend or repeal a charter, the Courts are bound to assume that its action was for political purposes, done for purposes of local internal government, and the fact that such action by the State affects contracts of the municipality, as an indirect and consequential result, does not render such legislation open to question by the holders of the contracts. In the case at bar, the repeal of the corporate existence of the Township may, in effect, render the bonds worthless; but if so, the holders can not be heard to complain. They took the bonds subject to this contingency. The legislation, ON ITS FACE, is not directed at the contract; if it affects it, it does so by indirection, as an INCIDENT or CONSEQUENCE. It would be a dangerous doctrine, we submit, to declare that the policy of a State in the administration of its internal affairs, the local government of its people, must be subversive and subservient to every contract entered into by one of its political subdivisions.

In the case of U. S. vs. Quincey the corporation was a going concern. It was a corporate entity, exercising corporate powers, having corporate officers, and performing corporate functions. The legislation there discussed, did not purport to take any of these away, but left all of them in tact; it bore on ITS FACE an attempt by the Legislature to make it impossible for the municipality to perform its obligations, and at the same time left the municipality in tact as a corporate body, allowing it to go on in the discharge of corporate functions. In the cases following Quincey, and re-affirming its doctrines, the municipal bodies

were active going concerns, having power to contract and be contracted with; and it would be remarkable, indeed, if it were in power of the Legislature to destroy the efficacy of their contracts, and at the same time leave them in possession of those powers which would enable them to go on contracting other obligations.

In Mobile vs. Watson, and the cases following it, the corporate existence of the municipality was destroyed; and while it was recognized, in those cases, that the contracts of the municipality might be thereby impaired, yet the Courts say that the legislation can not be declared void, because the Legislature has exercised a right inherent in it, and one which those who contracted with the municipality had notice it might exercise. As a matter of law, it cannot be said that such legislation impairs the obligation of the contract, for by repealing the corporate existence of the municipality, the State assumes its obligations; and in the Act destroying such corporations, is the implied promise of the State that she will take care of the obligations of the defunct corporation. In other words, the State, in the first instance, delegated the power to the municipality to contract obligations, by erecting it into a corporation; then by destroying the corporation, she recalls its territory, powers and functions into the great body of the State. The obligation resting upon the territory is there; but the State has assumed the control of those instrumentalities which were provided for its discharge. The fact that a State cannot be sued, will not justify the conclusion by any Court that the holders of obligations contracted by the defunct municipality cannot obtain relief from her.

In the case before the Court, the Township is gone, its officers and agents have been removed, and no declaration of this Court, we submit, can restore them. The Court may make these officers, the County Auditor and Treasurer, assess and collect a tax

from property situate in what was formerly Ninety Six Township, but if it does this, it will impose a task upon them as INDIVIDUALS, and not as OFFICERS of the Township, for they are not such officers and can not be made such officers by the declaration of any Court. The powers of the Township as a governmental agency can not be restored, for those powers belong to the State, and the State has recalled them from that political subdivision to which she had delegated them. All who dealt with the Township, are charged to have had knowledge of this.

We, therefore, submit, that on the theory that the amendment to the Constitution is void, the application for a writ of mandamus must fail.

CONCLUSIONS.

Our position briefly stated is as follows:

1st. That the County Auditor and County Treasurer are not made the corporate agents of the Township by the Act providing for the issuing of these bonds and creating the Township corporations; but on the contrary, the County Commissioners are made, in express terms, its corporate agents.

2nd. That the Constitution of the State of South Carolina of 1868 and that of 1895 restrict the right of the Legislature to delegate the power of assessing and collecting tax to the "corporate agents" of the Township, and any undertaking by the Legislature to authorize the assessing and collecting of Township taxes, unless to corporate agents, would be entirely void.

3rd. That the Legislature did not undertake to levy the tax, but undertook to delegate the power to levy and collect it to the County Auditor and County Treasurer without making them corporate agents.

4th. If it be held, however, that the Legislature itself did undertake to levy this tax, then, the County Auditor and County Treasurer are its officers, and this proceeding would resolve itself into a proceeding against the State because the Auditor and Treasurer

certainly have no interest whatever in the matter, one way or the other, and the State in that view would be the real party in interest.

5th. If, in effect, the Act should be held to appoint the County Auditor and County Treasurer corporate agents of the Township, the amendment to the constitution of the State has destroyed the corporate capacity of the Township and removed its officers and agents, and if they were agents, either in express terms or by implication, the constitutional amendment has removed them. If they are not agents they can not act, and certainly whatever may be the effect of the legislation, it removes them completely and entirely as agents and officers of the defunct Township. If they were agents of the Township they are removed, if not agents they have no power to act. The judgement, in any view should be reversed and petition dismissed.

Respectfully submitted,

F. BARRON GRIER,
J. B. PARK,
Attys. for Pl'ffs. in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1905.

T. A. Graham, County Auditor for Greenwood County, and J. A. Marshall, County Treasurer of Greenwood County, South Carolina, Plaintiffs in Error,

against

S. Ellen Folsom, Jennie F. Peck and Nannie F. McCanliss.

No. 108.

Brief in Behalf of Plaintiffs in Error by Jos. A. McCullough.

Statement of the Case.

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Brief in Behalf of Plaintiffs in Error by Jos. A. McCullough

Statement of the Case.

This case is here on writ of error to the Circuit Court of the United States for the District of South Carolina, that Court having issued a writ of mandamus directed to the plaintiffs in error, requiring them to assess and collect a tax upon the property in what was formerly known as Ninety-Six Township, Abbeville County, to pay the judgment which the defendants in error obtained against the said township on August 28, 1896, the said judgment being for interest due on bonds issued by the said township in aid of the Greenville & Port Royal Railroad Company.

Article 9, Section 8 of the Constitution of 1868 (herein after fully set forth) authorized the Legislature of South Carolina to clothe the municipalities therein mentioned, townships being among the number with the power to assess and collect taxes for "corporate purposes" through the "*corporate authorities*" of such municipalities.

In 1882, the Legislature of South Carolina passed an act to charter the Greenville & Port Royal Railroad Company, and among other things authorized any township along the line to subscribe to its capital stock in the manner therein

provided, but did not incorporate the said townships. See Statutes of South Carolina, Vol. 18, page 214.

Thereafter, in 1885, the Legislature of South Carolina passed an act to amend the aforesaid act and among other things incorporated the said townships, appointed the County Commissioners of the respective counties the "corporate agents" of the townships situate within the limits of the said counties, and further provided "that for the payment of the "interest on such bonds as may be issued by said counties, "cities, towns or townships, the county auditor, or other of- "ficer discharging such duties, or the city or town treasurer, "as the case may be, shall be authorized and required to as- "sess annually upon the property of the said city, town, "county or township such per centum as may be necessary to "pay said interest of said sum of money subscribed," etc. (Vol. 19, Statutes of South Carolina, page 240.) In 1887, the Legislature passed an act further amending the act chartering the said road by providing for the payment of the principal of the bonds by taxation as was provided for the payment of the interest, (Vol. 19, Statutes of S. C., page 921.)

In accordance with the provisions of the said acts, the Township of Ninety-Six, then in *Abbeville* County, voted a subscription to the capital stock of the said railroad company and bonds were issued by the County Commissioners of Abbeville County on behalf of said township.

In 1887, certain tax-payers in said township paid their taxes, on account of the interest on said bonds, under protest and thereafter brought their action in the State Courts of South Carolina to recover the same upon the ground that the acts authorizing the issue of said bonds were unconstitutional under Article 9, Sec. 8 of the Constitution of South Carolina, supra, in that the said bonds were not issued for a "*corporate purpose*," as required by said constitutional provision, and this contention was sustained by the Supreme Court of South Carolina. See *Floyd vs. Perrin, 30 S. C., page 1.*

Thereafter, the defendants in error brought their action in the Circuit Court of the United States against said Town-

ship of Ninety-Six to recover a sum due upon past due coupons attached to the said bonds, alleging that they were not residents of the State of South Carolina, and that they purchased the said bonds prior to the decision of the said State Court in *Floyd vs. Perrin*, supra, and that said bonds were valid obligations of the said township. To this complaint, a demurrer was interposed by said township upon the ground that the said acts were unconstitutional and had been so declared by the Supreme Court of South Carolina in *Floyd vs. Perrin*, supra. This Court in *Folsom vs. Ninety-Six, 159 U. S., page 611*, held that the said acts were *not* in violation of Article 9, Sec. 8 of the Constitution of South Carolina in the particular alleged, since the building of a railroad *was "a corporate purpose"* in contemplation of said constitutional provision. Thereafter, on August 14, 1896, judgment was recovered by the defendants in error against the said Township of Ninety-Six, and execution was issued on August 28, 1896.

In 1895, a constitutional convention was held in the State of South Carolina, and by Sec. 11, Art. 7 thereof, each of the several townships in the State with names and boundaries then established by law were constituted a body politic and corporate. The same constitutional convention created the County of Greenwood and made the Township of Ninety-Six a part thereof. On the 17th day of February, 1900, the act chartering the Greenville & Port Royal Railroad Company and all acts amending the same were repealed, Vol. 23, Statutes at Large, page 566. On the 25th day of February, 1902, the Legislature of South Carolina passed an act providing for the appointment of a township assessor and township collector for all townships authorized and required to levy and collect taxes for township purposes and appointing them "corporate agents" of said townships for any and all purposes. See 23 Statutes at Large, page 1181.

By concurrent resolution the Legislature of South Carolina, on February 28th, 1902, proposed this amendment to Sec. 11, Art. 7 of the Constitution, supra: "That this sec-

tion shall not apply to the following townships in the following counties: Dunklin and Oaklawn in the County of Greenville; the Townships of Cokesbury, Ninety-Six and Cooper in the County of Greenwood; Sullivan in the County of Laurens; Huitt and Pine Grove in the County of Saluda. The corporate existence of the said townships be and the same is hereby destroyed, and all offices in said townships are abolished and all corporate agents removed." (23 Statutes of South Carolina, page 1227.) This amendment was voted upon favorably at a general election held in November, 1902, and in February, 1903, was adopted by the General Assembly by a concurrent resolution. Thus it became a part of the Constitution of South Carolina.

Thereafter, on June 21, 1904, the defendants in error filed their petition for a mandamus, asking that the County Auditor and County Treasurer of Greenwood County be required to assess and collect upon all the property of the Township of Ninety-Six a sufficient per centum to pay their aforesaid judgments against the said township.

Upon this petition, the said county auditor and county treasuser were required to show why the writ of madamus prayed for should not be granted.

On August, 1, 1904, they filed their return and among other things alleged that they were never constituted corporate agents of the said township, that they were not at that time such corporate agents, and that the corporate existence of the said township had been destroyed by constitutional amendment and all corporate agents removed. The return, however, was over-ruled by his Honor, J. C. Pritchard, Circuit Judge who in a decree of date July, 30, 1904, held substantially that the constitutional amendment of 1903, seeking to abolish the corporate existence of the townships therein mentioned and remove all corporate agents was itself in violation of the federal constitution in that it was aimed directly at the remedy of the bond holders contained in the act authorizing the issue of the said bonds and further that the county auditor and county treasurer were in no sense the

corporate agents of the said township and even if said townships were abolished the machinery provided by law for the collection of the said tax remained uuimpaired.

The writ of mandamus having issued in accordance therewith, writ of error was granted.

Specifications of Error Relied Upon.

1. Error in holding;" It cannot be doubted that the constitutional amendment of 1903 was intended to impair the means provided by law for the payment of these bonds, to this extent it is obnoxious to article 1, clause 10 of the Constitution of the United States", the error being:

a. The court had no right to impute bad motives to the legislature, and it was error so to do in this instance.

b. There was no testimony whatever to support such a finding, and conclusion on behalf of his honor and without the most positive and convincing testimony, the court will not impute bad motives to the legislature of a soverign state and an inspection of the constitutlonal amendment in question does not warrant such a conclusion in this case.

c. The legislature of South Carolina, under its general authority as well as by act ratified the 17th day of December, 1841, XI. Stat. 183., has full control over all corporations, municipal as well as private, and thereafter created by it, and reserves to itself the right to alter, repeal or amend the charter of any corporation thereafter created by it. When the legislature chartered the township of Ninety Six, it was subject to this paramount right to repeal, and the creditors took these bonds with notice thereof, and when there after the corporate existence of the township was destroyed it was in the exercise of this reserved power, and it was not intended to impair the obligation of any contract entered into by the said township."

2. Error in holding:

"The act of 1885, which invested the township with corporote functions was passed solely for the purpose of this contract and as such was intended to afford the bond holders

a safe and sure remedy. It did not undertake to incorporate the township of a general municipal corporation, it simply gave the township certain functions to be exercised solely and exclusively for the purpose of making and discharging the contract, and the provisions of the same thereby became a part of the essential elements of the contract, and do not in any wise partake of the character of the powers ordinarily conferred upon a township or other territory in order to enable such township or territory to exercise the functions of a municipal corporation. Therefore, the constitutional enactment in question is aimed at a municipal corporation, but is in the nature of a direct attack upon legislation, which has for its object the enforcement of a contract," error being.

a. Under the constitution of 1868 in force at the time the act authorizing the issue of these bonds was ratified, the legislature could not delegate the power of taxation to any but a public, municipal corporation, to be exercised for a corporate or governmental purpose; the building of a railway was for such purpose as held by the Supreme Court of the United States in Folsom vs. Ninety Six Township 159 U. S., page 612. The defendant corporation, therefore, became assimilated to all other public municipal corporations created for a public or governmental purpose, which corporations are at all times subject to legislative enactments.

b. The act in question incorporating the said towuship did not limit it to the single power of subscribing to the capital stock of the proposed railway, and even if it had, such power, being for a public or governmental purpose, the same rules, which apply to other public municipal corporations would apply equally to this one.

c. If the township was incorporated as a municipal corporation, or governmental agency, it could make no difference whether it were clothed with one or a dozen different functions it would nevertheless be a general municipal corporation, subject absolutely to legislative control, and no contract entered into on the part of said corporation could deprive the legislature of its general and reserved right to

destroy its corporate existence at any time it saw fit, and creditors dealing with it did so subject to such contingency."

3. The court erred in holding:

"If the contention that the legislature had the right to destroy the corporate existence of the township be true we are nevertheless confronted with the fact that the instrumentalities and means employed by the legislature, in this instance for the purpose of enforcing the collection of a tax are still unimpaired," the error being:

a. Under the provisions of the constitution of 1868, article 9, paragraph 8, which authorized the acts of 1882 and 1885, under which the bonds in question were issued, only the "corporate authorities" of the municipalities therein mentioned could be vested with power to assess and collect taxes for corporate purposes, and unless the county auditor and county treasurer in this case were the "corporate authorities" for the said township under the said section of the constitution, they would have absolutely no power to assess and collect taxes on behalf of said township, and the legislature itself could not impose upon them such duties, since it would be in violation of said constitutional provision. If, therefore, these officers are to be considered the corporate agents of the said township for the purpose of assessing and collecting such taxes, then by the constitutional and legislative acts, abolishing the corporate existence of said township and removing all corporate agents, the said county auditor and county treasurer could no longer be considered as agents of such township, and could no longer be required, as such agents, to perform any duties whatsoever on behalf of said township. A dead principal can have no living agent, and the act destroying the principal involves also the destruction of all agents."

4. After having held and decided as follows:

"The county auditor and county treasurer are not officers or the agents of the township in any sense of the word."

His Honor was in error in ordering and adjudging that a peremptory writ of mandamus do issue directed to the said

auditor and treasurer of the County of Greenwood, commanding the said auditor to assess on the property of the said township a sufficient per centum to pay the said judgment and costs and commanding the said treasurer of the said county to collect such tax so assessed and pay over the same upon said judgment until the same is wholly satisfied, the error being :

a. Under the constitution of 1868 only the agents of the said corporation could be required to assess and collect taxes on behalf of the said township.

b. Unless the said auditor and treasurer were agents of the said township no duty was ever imposed upon either of them in the matter of assessing or collecting said taxes.

c. If the said officers are not agents of the said corporation but are state officers, then this proceeding cannot be maintained, because it is in effect a suit against the state to compel it, through its officers and agents to perform a duty which it owes to the bond holders, and is, therefore, obnoxious to the Federal Constitution prohibiting a suit against a state except by its consent."

5. The court erred in holding,

"The county auditor and treasurer are authorized and empowered to do that which may be done lawfully independent of the corporate existence of the township," error being :

a. That under article 9, section 8 of the constitution of 1868, the legislature could only clothe a municipal corporation with power to levy and collect taxes, (1st) for corporate purposes and (2nd) by and through its corporate agents, and the legislature in this case not having itself directly *levied* the tax in question, but having delegated *such* power to the municipal corporation (Construction Co. vs. Township, 49 S. C., page 535) the tax could only be levied by the corporation and collected through its officers and agents."

6. "The court erred in not holding and adjudging that the respondents herein were without power to levy and collect the tax for the payment of plaintiff's judgment under

the act of South Carolina approved the 25th day of February, 1902, vol. 23, Statutes at Large, page 1181, providing for the appointment by the governor of a township assessor and township collector, requiring them to assess and collect all taxes on behalf of all townships therein mentioned."

7. "The court erred in not holding and adjudging that the corporate existence of the township of Ninety Six having been abolished and its corporate officers and agents removed, and the creditor being limited to enforcing the remedy provided for by the act, that the said respondents were not officers or agents of the said corporation, and were not subject to the process of this court."

Brief of the Argument.

In order to obtain a clear conception of the issues involved herein, it will be necessary to note particularly the constitutional provisions, acts of the legislature and decisions of the courts in force at the time said bonds were issued, and at the time the petition for mandamus was applied for. Before calling attention to these provisions, however, it is well just here to bear in mind that in South Carolina taxes can *only* be assessed and collected in *two* ways. (1) When levied by the *legislature* by the officers or agents of the *state*. (2) Where a *municipal corporation* is clothed by the legislature with the power to assess and collect taxes for "corporate purposes," then by the "*corporate authorities*" of such municipality. So in this case, the plaintiffs in error have no authority *individually* to ley, assess or collect this or any other tax. They can only be required to do so either (1) as agents of the state or (2) as "corporate authorities" of the township in question. They submit that they are not subject to mandamus by this court in the capacity of officers or agents of the *state* and cannot be required to perform a duty which the *state* owes to the bond holder, for the reason that such proceeding would be in effect a *suit* against the state and, therefore, obnoxious to the federal constitution. (2) That they cannot be compelled as "cor-

porate authorities" of the *township* in question to assess and collect taxes on *its* behalf since said tax would have first to be *levied* by said townshlp; and since said township is no longer in existence, having been destroyed by constitutional amendment, it cannot *levy* such tax, nor can it have corporate authorities to assess and collect the same. So, it is, therefore, important to determine at the outset of this discussion in what *capacity* plaintiffs in error are required to perform the duties chargeable to them. Do they appear before this court as "corporate authorities" of the Township of Ninety Six, or in some *other* capacity? The circuit judge in his decree says, at folio 24 "The county auditor and treasurer are *not* officers or agents for the township in any sense of the word." If this be so, then we shall argue that, under the Constitution and Acts of force at the time these bonds were issued, they cannot be required to assess and collect this tax, because, under the said Consiitution, *only* "the *corporate authorities* of counties, *townships*, school districts, cities, town and villages may be vested with power to assess and collect taxes for corporate purposes," and this Constitutional provision was a limitation upon the power of the Legislature in that behalf, of which the world must take notice. If, on the other hand, the plaintiffs in error *were* the corporate authorities of the township in question, then the said township, being a governmental agency, and having been clothed with the powers of taxation for a governmental purpose to wit, the building of a high way, was at all times subject to the control of the Legislature, which Legislature, or sovereign state, could at any time modify or destroy its corporate existence, and those who dealt with it did so subject to such contingency, and if its corporate existence was destroyed, it could no longer have "corporate authorities," the powers of taxation with which it was clothed reverted back to the state, and the fact that a creditor is unable to avail himself of the remedy *for the collection of his debt* provided for in the act would not render the said legislation unconstitutional.

Article 9, Section 8 of the Constitution of 1868 provides as follows: "That the *corporate authorities* of counties, "townships, school districts, cities, towns and villiages may "be vested with power to assess and collect taxes for corpo- "rate purposes, such taxes to be uniform in respect to per- "sons and property within the jurisdiction of the body im- "posing the same. And the General Assembly shall require "that all the property except that heretofore exempted with- "in the limits of municipal corporations, shall be taxed for the "payment of debts, contracted under authority of law." Where the Legislature exercises the power *thus* delegated to it, and clothes a municipality therein mentioned with the power of taxation, it can *only* do so subject to the following limitations and restrictions:

(1) The tax must be for a "*corporate purpose.*"

(2) It must be assessed and collected by "*corporate authorities.*"

(3) It must be uniform in respect to persons and property within the jurisdiction of the body composing the same. Under Section 1, Article 9 of the Constitution of 1868, the Legislature may *itself* levy taxes and authorize *its* officers and agents to collect the same subject to only *one* limitation to wit, the tax must be for a "*public purpose.*" *See Floyd vs. Perrin, 30 S. C. page 1*; *State vs. Whiteside, 30 S. C., page 379*; *State vs. Harper, 30 S. C., page 586*; *State vs. Neely, 30 S. C., page 587*; *Construction Co. vs, Columbia Township, 49 S. C., page* 535. In this latter case, the court had under consideration an act substantially like the act in question, and draws attention to the destinction between a case where the Legislature *itself* levies a tax and a case where it clothes a municipality with such power, and in that connection reviews the decision of this court in *Folsom vs. Ninety Six Township, 159 U. S., at page 611* in the following language: "We do not think that the decision in Folsom vs. "Ninety-Six Township affords any sufficient reason why this "court should abandon the conclusion reached by this court, "after full and able argument in the case of Floyd vs. Per-

" rin. The reasoning employed in the opinion of the Supreme " Court, in Folsom vs. Ninety Six township, so far as we can " perceive, adds nothing to the argument of Mr. Justice Mc- " Gowan in his very elaborate and able dissenting opinion in " Floyd vs. Perrin, and, of course, it must be assumed (and " the writer of this opinion knows that this assumption is " well founded in fact) that the court gave careful considera- " tion to that argument before rendering its decision, which " was not then regarded as convincing, and is not sufficient " now, even though endorsed by the distinguished jurist who " prepared the opinion in Folsom vs. Ninety-Six Town- " ship to warrant this court in reversing its deliberate " opinion in Floyd vs. Perrin, reaffirmed, as it was, in " the case of Whiteside vs. Neely, 30 S. C., 31, and " expressly recognized in the subsequent case of State vs. " Whiteside, 30 S. C., page 582-3, and by necessary implica- " tion, also recognized in State vs. Neely, 30 S. C., 587. It " is, therefore, with no little surprise that we find the learned " Justice, who delivered the opinion of the Supreme Court of " the United States in Folsom vs. Ninety Six Township, using " language which implies that he considered the case of " Floyd vs. Perrin practically overruled by the subsequent " cases of State vs. Whiteside and State vs. Neely. It is " difficult, if not impossible, to conceive how such a miscon- " ception could have arisen. In Floyd vs. Perrin, this Court " was called upon to pass upon the constitutionality of an act " by which the legislature undertook to delegate to certain " townships the power to create a debt, and by necessity the " power to impose a tax for the payment of such debt, which " it could not do under the express terms of sec. 8 of art. IX " of the Constitution of 1868, except for a *corporate* pur- " pose; and as the court in Floyd vs. Perrin, held that there " was no corporate purpose, the statute was necessarily de- " clared to be unconstitutional. But in the subsequent cases " of State vs. Whitesides and State vs. Neely, this court was " called upon to pass upon the unconstitutionality of a total- " ly different act (the act of 1888), passed for a totally differ-

" ent purpose. For, by the act of 1888, the legislature did " not undertake to delegate any power, either of creating a " debt or of imposing a tax for the payment thereof, to any " subordinate agency of the government, but, on the contrary, " the declared object of the act of 1888 was to impose upon " certain townships debts, and to authorize taxation for the " payment of the same, *by the inherent power of taxation* " *vested in the legislature* by the terms of the constitution, " and *not* to delegate such power to any subordinate agency. " In the one case, the power to delegate was subject to *two* " limitations: First, that the tax was to be for a *public* pur- " pose, and, second, that it must be for a *corporate* purpose; " while in the other case, where the legislature itself created " the debt and authorized the tax, the power was subject to " only *one* limitation, to wit: It must be for a public pur- " pose. Hence when as in the case of Floyd vs. Perrin, " which involved a *delegated* power, the court finding that, " though the debt was created and the tax authorized was for " a *public* purpose yet the *corporate* purpose was wanting, " the court was compelled to hold that the statute which un- " dertook to delegate the power was unconstitutional, be- " cause it failed to meet *both* the requirements or conditions " upon which such power could alone be delegated. But in " the subsequent cases of Whitesides and Neely, which arose " under a different act, in which no question of *delegated* " power was represented but only the power of the legislature " itself *directly* exercised, in which, so far as this question is " concerned, there was only *one* limitation—the *public pur-* " *pose*—and the court, finding that this purpose was present, " was compelled to hold the statute constitutional. The fore- " going is but a brief, condensed statement of what had been " previously said, more at large, in State vs. Neely, 30 S. C., " at page 603, et seq. How, in the face of the views there " presented, and substantially repeated here, any one could, " for a moment, suppose that there was the slightest incon- " sistency between the cases of Floyd vs. Perrin and the sub- " sequent cases of Whitesides and Neely, passes our compre-

" hension. The statutes involved were different, the pur-
" poses of those statutes were different, and the constitution-
" al provisions involved were different, and it would have
" been remarkable if the conclusions reached had not been
" different. We think, however, that we can percieve how it
" was that the learned Justice, who delivered the opinion of
" the Supreme Court of the United States, fell into the error
" of supposing that the case of Floyd vs. Perrin was practical-
" ly overruled by the subsequent cases of Whitesides and
" Neely, for, after quoting, and quoting correcly, the lan-
" guage appended by Mr. Justice McGowan to his concur-
" rence in the last named cases, Mr. Justice Gray uses the
" following language :

" As the debt thus held to be imposed upon the town-
" ship by the act of 1888 was *the debt* represented by the
" bonds issued under the act of 1885," etc. The use of the
" words "the debt" which we have italicized in the preced-
" ing quotation, is misleading, and betrays an entire miscon-
" ception of the true and, what seems to us, the plain mean-
" ing of the language used and the principles laid down by
" the court. It is very obvious from the whole tenor of the
" decisions of this court in Floyd vs. Perrin, and the subse-
" quent cases, that the fundamental idea upon which this
" court proceeded was that there never was any *debt* created
" by the act of 1885, and hence none could have been *rep-*
" *resented* by the bonds issued, without authority, under the
" so-called authority of the act of 1885. The true meaning
" of the language used by Mr. Justice McGowan manifestly
" was, that the debt, which was for *the first time* created by
" the act of 1888, should be represented, so far as amount,
" time of payment, etc. were concerned, by the bonds pre-
" viously issued without authority, a form of expression sim-
" ply used for the purpose of avoiding a useless repetition of
" those particulars, and certainly *not* for the purpose of even
" implying that those bonds originally represented any valid
" debt whatever, as that would have been a flat contradic-
" tion of the declaration of the court emphatically expressed

" in the very opinion to which this language was appended.
" We must adhere, then, to the decision in Floyd vs. Perrin,
" and are unable to find any satisfactory reason why that case
" should be overruled. We have not deemed it necessary to
" repeat here the argument upon which that case was de-
" cided, and content ourselves with merely referring to the
" same.

" It is contended, in the argument in reply, that the
" terms of the acts upon which appellant relies are different
" from those which were considered in the case of Floyd vs.
" Perrin, and, therefore, the decision in that case is not con-
" clusive of this. While it is true that some minor differ-
" ences in the several acts have been pointed out, yet we
" think they are all substantially the same, and present pre-
" cisely the same question as that decided in Floyd vs. Per-
" rin. The controlling question under all of these acts is,
" whether the legislature had the power to delegate to a town-
" ship the power to create a debt, which necessarily involves
" the power to impose a tax for the payment of such debt,
" for any other than a corporate purpose, and we think it
" clear that no such purpose is shown in the acts under con-
" sideration here."

We call attention to this language of the lamented late Chief Justice Henry McIver, not for the purpose of discussing differences of opinion between the Supreme Court of South Carolina and this Honorable Court touching the construction of the statute in question, for it will be observed that both the Supreme Court of South Carolina in Floyd vs. Perrin and this court in Folsom vs. Ninety-Six Township supra (in which this statute in question was under review) hold that it was passed in pursuance of article 9 Sec. 8 supra, which article the learned Justice who wrote the opinion in Folsom vs. Ninety-Six, quotes in the opening of that opinion as the foundation for the act authorizing the issue of these bonds. If, therefore, as held by *both* the Supreme Court of South Carolina and the Supreme Court of the United States, this act was passed in accordance with said article 9 section

8 of the Constitution of 1868, and if under the express terms of the said Constitution the said taxes could *only* be assessed and collected by "the corporate authorities" of the "township," and if as held by the circuit judge in this case (see brief, folio 34) "the county auditor and treasurer are *not* officers or agents of the township in any sense of the word," then it follows necessarily that the petition as to the plaintiff in error should have been dismissed.

It will not do to say that this provision of the Constitution is not exhaustive, and that therefore the legislature could authorize some one other than the "corporate authorities" of the municipalities therein mentioned "to collect taxes for corporate purposes." The Supreme Court of South Carolina in Mauldin vs. City Council, 42 S. C., page 293 and reaffirmed in 52 S. C., at page 285, laid down the principle that the legislature itself could only levy taxes or delegate such authority to municipalities as *authorized* by the Constitution of 1868, and that such Constitutional provisions *were* limitations upon the legislative power and were *exhaustive*. If, under the said Constitutional provisions the legislature could only delegate this power to a municipality to be exercised for a "corporate purpose," then it could only delegate such power to be exercised by proper "corporate authorities," for the one is as much a limitation upon the legislative power as the other.

That this was the intention of the legislature by the acts in question there can be no doubt. The act chartering the said railroad and authorizing municipalities along its line to subscribe to its capital stock and issue bonds in payment thereof (see Statutes of South Carolina, vol. 18, page 214) after providing that such municipalities might subscribe to its capital stock upon certain conditions therein mentioned provides in section 9 that certain officers representing the various municipalities therein mentioned should be authorized and required on behalf of such municipality to assess and collect taxes to pay the interest on the bonds, to wit, the "county auditor," or other officer discharging such duty on behalf of the counties, the "city or town treasurer" on behalf of the

city or town, but the townships were not incorporated by the said act, nor were any corporate agents appointed for them. Now if the legislature had intended *itself* to levy and collect taxes within the territorial limits of what was then designated and known as "townships" it would have been perfectly competent for it to have done so since the building of a railroad is a "public purpose." *State vs. Whitesides* and *State vs. Neely supra.* But in 1885, *see Vol. 19 Statutes of South Carolina, at page 237*, the legislature amended the aforesaid act and among other things incorporated the said townships and declared the *county commissioners* "to be the corporate agents of the counties or townships so incorporated and situate within the limits of the said counties," thus clearly indicating the legislative intent that in subscribing to the capital stock of the said road, and in levying and collecting the taxes to pay the interest on the bonds authorized, the said townships should act as *corporate entities* and through their duly constituted "corporate authorities." The circuit judge in his decree says that the county commissioners were the corporate authorities of the township *only* for the purpose of *issuing the bonds* (See Brief, folio 25). The act does not so declare. The Court below therefore was in error in not dismissing the petitions as to the plaintiffs in error upon the ground that they were not the "corporate authorities" of the township in question.

But assuming that they were under the act "corporate authorities" of the said township, were they such *at the time* the petition for mandamus was filed? This depends upon whether or not, at that time, the Township of Ninety-Six had any legal existence for the duty of *levying* taxes sought to be collected devolves upon the said *township* and said taxes can only be *assessed* and collected after they are *levied.* As was said by late Chief Justice McIver as the organ of the Court in *Construction Co. vs. Township, supra,* construing the act now in question. "The legislature undertook to delegate to certain townships the power to create a debt and by necessity the power to impose a tax for the payment of such

debt." If, therefore, the township be defunct it cannot *levy* the tax and a tax that cannot be *levied* cannot be *assessed* nor *collected*. The Constitution of 1895, Section 11, Article 7, provides: Each of the several townships of this state, with names and boundaries as now established by law, shall constitute a body politic and corporate, but this act shall not prevent the General Assembly from organizing other townships, or changing the boundaries of those already established; and the General Assembly may provide such system of township government as it shall think proper in any and all the counties, and will make special provision for municipal government and for the protection of chartered rights and powers of municipalities."

The following amendment to this section was proposed by a concurrent resolution of the legislature of February 28, 1902: "That this section shall not apply to the following "townships in the following counties: Dunklin and Oak-"lawn in the County of Greenville; the Townships of "Cokesbury, Ninety-Six and Cooper in the County of Green-"wood; Sullivan in the County of Laurens; Huitt and Pine-"grove in the County of Saluda. The corporate existence "of the said townships be, and the same is hereby destroy-"ed, and all officers in said township are abolished and all "corporate agents removed." This amendment to the Constitution was voted upon favorably at a general election held in November, 1902, and in February, 1903, by a concurrent resolution was adopted by the General Assembly of South Carolina. It thus became a part of the Constitution of the State and is conclusive of the questions involved in this appeal provided the said Constitutional Amendment be itself constitutional.

It has been settled by numerous decisions of this Court that the Legislature may change or repeal the charter of municipal corporations created by it and that improper motives for so doing cannot be imputed to it. The theory that nnderlies this proposition is that a municipal corporation is a governmental agency, created for governmental purposes, and

endowed with governmental functions, and it is, therefore, always subject to the exercise of sovereign power; no contract entered into between the said municipal corporation and a private individual can change this relationship, and creditors deal with it with notice of this fact.

At the time the act incorporating this railroad company and incorporating the Township of Ninety-Six was passed, there was in existence an act of the General Assembly of South Carolina passed December, 1841, as follows:

"It shall become part of the charter of every corporation, which shall, at the present, or any succeeding session of the General Assembly, receive a grant of a charter, or any renewal, amendment, or modification thereof (unless the act granting such charter, renewal, amendment, or modification shall, in express terms, except it), that every charter or incorporation granted, renewed, or modified as aforesaid, shall at all times remain subject to amendment, alteration, or repeal by the Legislative authority (see *Statutes at Large, Vol. 11, page 168*)."

The act incorporating this railroad company and the Township of Ninety-Six did not except the said charters from the operation of this section. Says this court through Mr. Justice Field in *Tomlinson vs. Jessup*, 15 *Wallace*, 457, referring to this statute: "The provisions of that law, therefore, constituted the condition upon which every charter of a corporation subsequently granted was held, and upon which every amendment or modification was made. They were as operative and as much a part of the charter and amendment, as if incorporated into them." It is true that at page 459, the court says: "Rights acquired by third parties and which have become vested under the charter, in the legitimate exercise of its powers, stand upon a different footing;" but this principle of law has no application to a *public* or *municipal* corporation, since the only right which a creditor of such corporation has in a case like this is the right to have a tax levied, assessed and collected in his favor; and this being an exercise of a *governmental function* no creditor can claim a

vested right in such exercise. We shall hereafter cite abundant authority to sustain this position. So then, by virtue of the power inherent in sovereignty, and, in this case, reserved by special act, it was competent for the sovereign authority of South Carolina to destroy the existence of this municipal corporation created by it for governmental purposes and clothed with governmental power. In his decree, the Circuit Judge says: "It cannot be doubted that the Constitutional "amendment of 1903, was intended to impair the means "provided by law for the payment of these bonds, to this "extent it is obnoxious to Article I, clause 10 of the Consti-"tution of the United States." It will be observed that there is nothing in the constitutional amendment in question, or the act ratifying the same which *in terms* shows that their purpose was to impair the obligation of a contract. Because it has the *effect* of depriving the creditor of his remedy provided for by the act, the court assumes that, *therefore*, this *must* have been the legislative intent. This, we respectfully submit is error. In the case of *Amy vs. Watertown*, 130 *U. S., page* 319, the following language may be found: "With motives, we have nothing to do, certainly improper motives cannot be attributed to a state legislature in the passage of any laws for the government of the state. Individuals may be actuated by improper motives, and may take advantage of defects and imperfections of the law for the purpose of defeating justice. The Mayor of Watertown may have been actuated by such a motive in resigning his office immediately after being inducted into it. But he had a legal right to resign; and if the plaintiffs are prejudiced by this action, it is *damnum absque injuria*. The plaintiffs are in no worse case than the creditors of the City of Memphis after the repeal of its charter and the establishment of taxing districts in its stead. The state has power over its municipal corporations to change her organizations, to modify their method of internal government, or to abolish them altogether. *Contracts entered into with them by private parties cuanot deprive the state of the paramount authority.*"

In *Atkins vs. Kansas*, 191 *U. S., 220*, the court uses this language: "These questions—indeed, the entire ar- "gument of defendant's counsel—seem to attach too little "consequence to the relation existing between a state and "its municipal corporation. Such corporations are the "creatures, mere political sub-divisions, of the state for the "purpose of exercising a part of its powers. They may ex- "ert only such powers as are expressly granted to them, "or such as may be necessarily implied from those granted. "What they lawfully do of a public character is done under "the sanction of the state. They are, in every essential "sense, only auxiliaries of the state for the purpose of local "government. They may be created, or, having been "created, their power may be restricted or enlarged, or "altogether withdrawn at the will of the legislature; The "authority of the legislature when restricting or with draw- "ing such powers being subject only to the fundamental "condition that the collective and individual rights of the "people of a municipality shall not thereby be destroyed." Citing *Rogers vs. Burlington, 3 Wallace, 654, 663; U. S. vs. Ry. Co., 17 Wallace, 322, 328-329; Mount Pleasant vs. Beckwith, 100 U. S., 514, 525; State Bank of Ohio vs. Knoop, 16 Howard, 369, 380; Hill vs. Memphis, 134 U. S., page 198, 203; Barnett vs. Dennison, 145 U. S., 135, 139; Williams vs. Egleston, 170 U. S. 304, 310.*

The plenary power of the state over municipal corporations cannot be restricted by contracts entered into by the municipality with private parties. *Shapleigh vs. San Angelo, 167 U. S., page 654; Dillon Municipal Corporations (4th edition,) vol. 1, page 172.*

But, says the circuit Judge (brief, folio 25) "the at- "tempt to abolish the township and destroy the machinery "for taxation and to transfer the territory to another county, "is a *direct* attack upon the remedy which is given the pe- "titioner by the acts to authorize the issuance of the bonds "and the fact that the attempt is made by Constitutional "enactment does not give it any additional force." We re-

spectfully submit that an inspection of the constitutional amendment does not sustain this conclusion. In the case of *Wolf vs. New Orleans*, 103 *U. S.* at *page* 365, Mr. Justice Field clearly states what legislation does and what legislation does not, impair the obligation of a contract. He says "The "argument in support of the act is substantially this: "That the taxing power belongs exclusively to the legisla- "tive department of the government and when delegated to "a municipal corporation may, equally with other powers "of the corporation, be revoked or restricted at the pleasure "of the legislature. It is true that the power of taxation "belongs exclusively to the legislative department, and that "the legislature may at any time restrict or revoke at its "pleasure any of the powers of a municipal corporation, in- "cluding among others, that of taxation, subject however, "to this qualification, which attends all state legislation, "that its action in that respect shall not conflict with the "prohibitions of the constitution of the United States, and, "among other things shall not operate *directly* upon con- "tracts of the corporation, so as to impair their obligation "by abrogating or lessening the means of their enforcement. "*Legislation producing this latter result, not indirectly as "a consequence of legitimate measures taken, as will some- "times happen, but directly by operating upon those means,* "is prohibited by the Constitution, and must be disregarded— "treated as if never enacted—by all courts recognizing the "Constitution as the paramount law of the land. This doc- "trine has been repeatedly asserted by this court when at- "tempts have been made to limit the power of taxation of "a municipal body, upon the faith of which contracts have "been made, and by means of which alone they could be "performed. So long as the corporation *continues in ex- "istence*, the court has said that the control of the legisla- "ture over the power of taxation delegated to it is restrained "to cases where such conrol does not impair the obligation "of contracts made upon a pledge, expressly or impliedly "given, that the power should be exercised for their fulfil-

"ment. However great the control of the legislature over "the corporation *while it is in existence*, it must be exer- "cised in subordination to the principle which secures the "inviolability of contracts." (italics mine.) In *Reese vs. City of Watertown*, 19 *Wallace* 107, the court says: "The "remedy is in law and in theory adequate and perfect. "The difficulty is in its execution only. The want of a "remedy and the inability to obtain the fruits of a remedy "are quite distinct and yet they are confounded in the pres- "ent proceeding." Tested by this rule, it will appear that the circuit judge was in error in holding that the constitutional amendment in question "is a direct attack upon the remedy" given the petitioners and therefore violative of the Federal Constitution, since the said Constitutional amendment does not either directly or indirectly *refer* to the Act authorizing the issue of the bonds and the fact that its *result* might be to deprive the creditors of their remedy provided for by the Act would not render the said amendment unconstitutional.

In examining the authorities upon this question, all the cases naturally divide themselves into three classes.

First: Where the corporation preserves its existence and by subsequent legislation it is sought to restrict or repeal the power of taxation previousiy given and pledged for the payment of the debts of such corporation. All such subsequent legislation has been declared invalid as impairing the obligations of a contract. To this class the case of *Von Hoffman vs. Quincy 4th Wallace* 553 (relied upon in the circuit decree) belongs and is a leading case. The case of *Nelson vs. St. Martin's Parish*, 111 *U. S.*, 720 also cited in the circuit decree belongs to this class. (It will be observed that Mr. Justice Field wrote the opinion also in this case. And there is nothing in it which conflicts with the rule stated by him *in Wolf vs. New Orleans supra.*) So also does the case cited in the circuit decree *La. vs. New Orleans*, 102 *U. S.*, 206, the opinion being also delivered by Mr. Justice Field. The case of *Walker vs. Whitehead* 16*th Wallace*, 317, an ex-

tract of which appears in the circuit decree as sustaining the position therein taken, is inapplicable for the reason that the suit was between *individuals* and the principle here contended for was not involved there. The case of *Hicks vs. Cleveland*, 45 *C. C. A.*, cited in the circuit decree belongs also to this class.

Second : The second class of cases is "where the municipal corporation is legislated out of existence and its territory annexed to other corporations" or substantially the same territory and inhabitants are erected into another corporation under a different name. In such instance, the new corporation will be liable for the debts of the old, "unless the legislature otherwise provides." To this class belong the following cases cited in circuit decree :

Mt. Pleasant vs. Beckwith, 100 *U. S.*, 514, *Mobile vs. Watson*, 116 *U. S.*, 286 ; *Broadfoot vs. Fayettville*, 124 *N. C.*, *page* 478. It will thus be observed that *every* case cited in the circuit decree, as sustaining the views therein expressed, belongs to either class one or two, supra, and therefore are not authority here.

Third : Where the legislature abolishes altogether a municipal corporation and makes no provisions for the payment of its debts. In such case, the authorities uniformly hold that the court cannot enforce the remedy provided for by the act since there is no longer in existence the corporation with its officers or agents and the creditors' only remedy is to appeal to the legislature for relief which legislature the courts must presume will do what is just and equitable. To this class belongs the following cases : *Barkley vs. Levee Commissioners* 93 *U. S., 258 :*

In this case the legislature of Louisiana authorized the board of commissioners to issue warrants or script, being "evidences of indebtedness" for work and labor done and provide for the assessment and collection of taxes to pay said warrants or scripts. Judgments were obtained upon these evidences of indebtedness. Thereafter, the legislature passed an act dividing up the districts and creating a new cor-

poration for one portion and placing the other under the charge of local authorities. A judgment creditor made application for a mandamus to be directed to the new officers, requiring them to levy a tax to pay his judgment. The court refused this application, deciding, 1. "A public corporation, charged with specific duties, such as building and repairing "levees within a certain district, being superseded in its "functions by a law dividing the district, and creating a new "corporation for one portion, and placing the other under "charge of the local authorities, ceases to exist, except so "far as its existence is expressly continued for special ob- "jects, such as settling its indebtedness and the like.

"2. If, with such limited existence, no provision is "made for the continuance or new election of officers of such "corporation, the functions of the existing officers will cease "when their respective terms expire, and the corporation will "be de facto extinct.

"3. In such case, if there be a judgment against the "corporation, mandamus will not lie to enforce the assess- "ment of taxes for its payment, there being no officers to "whom the writ can be directed.

"4. The court cannot, by mandamus, compel the new "corporations to perform the duties of the extinct corpora- "tion in the levy of taxes for the payment of its debts, espe- "cially when their territoral jurisdiction is not the same, "and the law has not authorized them to make such levy.

"5. Nor can the court order the marshal to levy taxes "in such a case, nor in any case except where a specific law authorizes such proceedings.

"6. Under these circumstances, the judgment creditor "is, in fact, without remedy, and can only apply to the leg- "islature for relief."

At page 264, the court uses this language: "Our conclusion from the whole case, therefore, is, that the corporation in question no longer exists, and that no mandamus can be issued to it or to the surviving persons who were formerly members of the boards."

Merriwether vs. Garret 102 U. S., 472 : In that case the City of Memphis, Tenn., issued bonds which were sued to judgment. Under mandate of the Federal Court, taxes were levied. Before the said taxes were collected, the charter of the City of Memphis was repealed, and a bill was passed to establish taxing districts in the said state and to provide the means of local government for the same. The City of Memphis constituted one of said districts. Pursuant to the provisions of the said act, the government appointed Merriwether to be receiver and back tax collector. The said receiver, under the act was required to pay the funds collected into the state treasury to be "paid out by the treasurer of the state from time to time to those entitled in such manner as the Chancery Court may adjudge and decree." No provision was made for the payment the judgment of creditors. They appealed to the U. S. Court for relief, alleging all the facts, and the court held :

" 1. That the property held for public use was not " subject to the debts of the judgment creditors. "Upon " the repeal of the charter of the city such property passed " under the immediate control of the state."

" 2. That the private property within the limits of the " territory of the city could not be subjected to the pay- " ments of the debts of the city, except through "taxation.

" 3. The power of taxation is legislative, and cannot " be exercised otherwise than under the authority of the leg- " islature.

" 4. That taxes levied before the repeal of the charter " could only be collected under authority from the legisla- " ture. If no such authority existed, the remedy was by ap- " peal to the legislature, which alone could grant relief.

At page 511, the majority of the court through Mr. Justice Field used the following language, "The right of the " state to repeal the charter of Memphis cannot be question- " ed. Municipal corporations are mere instrumentalities of " the state for the more convenient administration of local " government. Their powers are such as the legislature

"may confer, and these may be enlarged, abridged, or entirely withdrawn at its pleasure. This is common learning, found in all adjudications on the subject of municipal bodies and repeated by text writers. There is no contract between the state and the public that the charter of a city shall not be at all times subject to legislative control. All persons who deal with such bodies are conclusively presumed to act upon knowledge of the power of the legislature. There is no such thing as a vested right held by any individual in the grant of legislative power to them. *Unites Stated vs. Railroad Co.*, 17 *Wall*, 322; *Commissioners vs. Lucas, Treasurer*, 93 *U. S.* 108; *People vs. Morris*, 13 *Wend.* (*N. Y.*) 325; *Philadelphia vs. Fox*, 64 *Pa. St.* 169; *Montpelier vs. East Montpelier*, 29 *Vt.*, 12; *Angell vs. Amee, Corp.* (10 *ed.*) *Sect.* 31; *Dill Mun. Corp. Sect.* 30; *Cooley, Const. Lin.* 192, 193. *by the repeal the legislative powers previously possessed by the corporation of Memphis reverted to the state.*"

"At page 515, the following language may be found: "So long as the law authorizing the tax continues in force, "the courts may, by *mandamus*, compel the officers empowered to levy it or charged with its collection, if unmindful and neglectful in the matter, to proceed and perform "their duty; but when the law is gone, and the office of "the collector abolished, there is nothing upon which the "courts can act."

At page 518, the following language may be found, "When creditors are unable to obtain the payment of their "judgments against municipal bodies by execution, they can "proceed by mandamus against the municipal authorities to "compel them to levy the necessary tax for that purpose, "if such authorities are clothed by legislature with the taxing power, and such tax when collected, cannot be diverted to other uses; but if those authorities possess no "such power, or their offices have been abolished and the "power withdrawn, the remedy of the creditors is by an appeal to the legislature, which alone can give them relief.

"No Federal Court either on its law or equity side, has an "inherent jurisdiction to lay a tax for any purpose, or to "enforce a tax already levied, except through the agencies "provided by law. However urgent the appeal of creditors "and the apparent helplessness of their position without "the aid of the Federal Court, it cannot seize the power "which belongs to the legislative department of the state and "weild it in their behalf."

The minority of the court, at page 526, conceded this principle saying: "They certainly have no power to compel the levy of a tax by a corporation *which is without officers and which has ceased to exist*," but they were however, of the opinion that there *was* machinery in existence upon which the court could act in granting complainant's prayer.

It will be observed in this case that the city of Memphis had issued *bonds* upon which judgments had been obtained, and one of the allegations of the bill in that case was that "the complainants as creditors of the corporation and having valid debts against it are not and cannot be deprived of the vested rights secured to them by previous legislation." One of the questions certified to the Supreme Court of the United States (see proposition No. 2, page 498) was "whether the act of the General Assembly of the State of Tennessee, entitled "An act to repeal the charters of certain municipal corporations, and to remand the territory and the inhabitants thereof to the government of the State," passed Jan. 29, 1879, and approved Jan. 31, 1879, and which act in terms, as shown herein, repealed the charter and all laws incorporating the city of Memphis, was and is a valid law, *or whether the said act is contrary to the Constitution of the State of Tennessee or the Constitution of the United States, as against creditors holding bonds and debts contracted prior to the repeal.*"

In announcing the conclusions reached by the Court, Mr. Chief Justice Waite states that as to *this* proposition "*the court is unanimous*," holding that the acts in question were *not* unconstitutional. It seems to us, therefore, that

this case is clearly in point and effectually disposes of the contention of petitioners. The doctrine of this case has subsequently been re-affirmed in every case in which it has been drawn in question.

In the *case of Wolf vs. New Orleans*, 103 *U. S.*, 358, the court decides "*As long as a city exists*, laws are void which withdraw or restrict her taxing power so as to impair the obligation of her contracts made upon a pledge expressly or impliedly given that it shall be exercised for their fulfillment. Von Hoffman vs. City of Quincy (4 Wall., 535) cited on this point and approved." At page 368, Mr. Justice Field, as the organ of the Court, interprets the case of *Meriwether vs. Garrett*, saying; "These views are not inconsistent with the doctrine declared by the decision of the court in the recent case of *Meriwether vs. Garrett*, 102 *U. S.*, 472. There the charter of the city of Memphis had been repealed and the state had taken the control and the custody of her public property, and assumed the collection of the taxes previously levied, and their application to the payment of her indebtedness. *The city with all her officers having thus gone out of existence*, there was no organization left—no machinery upon which the courts could act by mandamus for the enforcement of her obligations to creditors. The question considered, therefore, was whether the taxes levied before the repeal of the charter, but not paid, were assets which the court could collect through a receiver and apply upon judgments against the city."

From this interpretation of the court, Mr. Justice Harlan dissents, saying, "I concur in the opinion just delivered except the paragraqh in which reference is make to *Meriwether vs. Garrett*, 102 *U. S.*, 472. The present case does not reqire us to determine any question as to the effect which the repeal of municipal charter may have upon the rights of existing creditors. Nor do I wish to be understood as as assentiug to the correctness of the statement in the opinion as to what was involved and decided in *Meriwether vs. Garrett*.".

In 1st *Dillon on Municipal Corporations, page* 250, the author gives a resume of the decisions of the courts upon this question, and although it is apparent that he is not in accord with those decisions, he fairly and frankly states the result as follows: "If the legislature repeals the charter of the "debtor corporation and dissolves it, and makes no provis- "ion for its debts, and it has no private property subject to "execution, and there is no res ce for the payment of "such indebtness but taxation, then if no new or successor "corporation be organized, and if no instrumentalities "of the taxing power remain subject to the process of the "courts, the rights of creditors are, in fact impaired or de- "stroyed, and it would seem that the courts are in such case "practically powerless to prevent this result; and that the "creditor's only remedy, which he would be very apt under "the circumstances to consider illusory, is to appeal for re- "lief to the legislative department of the government, that "is to say, to the very department that of set purpose "adopted the hostile enactment that cut down and destroyed "his rights and remedies."

Says *Cooley on Taxation, 3rd ed., page* 123: "If the "state, however, in the amplitude of its power over the "municipalities of the state, should see fit to take away "altogether the corporate powers of the debtor body, and "create instead one or more entirely new corporations, "which should in law be, not the successors of the other "under new names, but new and distinct creatures, the "creditors might perhaps, except as to the property of the "defunct body, be without remedy. The corporation hav- "ing ceased to exist, there could no longer be enforcement "of their demand through taxation under the old law and "without law, it is impossible that taxes should be laid. "This was held where the state, by general law, abolished a "considerable number of municipalities and made the several "counties embraced in the territorial limits of such munici- "palities respectively taxing districts, in order to provide the

"means of local government for the peace, safety and general "wellfare of the district."

But, says the circuit judge, in his decree at folio 44, "The act of 1885, which vested the townships with cor- "porate functions, was passed solely for the purpose of this "contract, and, as such, was intended to afford the bond "holders a safe and sure remedy. It did not undertake to "incorporate the township as a general municipal corpora- "tion, it simply gave the township certain functions to be "exercised solely and exclusively for the purpose of making "and discharging the contract, and the provisions of the "same thereby became a part of the essential elements of "the contract, and do not in anywise partake of the "character of the powers ordinarily conferred upon a town- "ship or other territory in order to enable such townsnip or "territory to exercise the functions of a municipal corpora- "tion. Therefore the constitutional enactment in question "is not aimed at a municipal corporation, but is in the "nature of a direct attack upon legislation which has for its "object the enforcement of a contract. No one questions "the power of the legislature at any time to abolish a "municipal corporation, provided that in doing so it does not "impair the obligation of a contract; but in this instance "the acts in question do not have the effect of abolishing a "municipal corporation as such,—the constitutional and "legislative enactments being directed against the means by "which the holders of the bonds are to be paid the amounts "due them." If, by the language used the circuit judge meant to suggest that the doctrine herein contended for does not apply to *this* corporation for the reason that it is not such a municipal corporation as comes within the rule there- in mentioned, we would ask upon what reason or authority is the distinction? Corporations are either *public* or *private*. If this be a *private* corporation, then certainly the petitioners are without remedy, since a *private* corporation cannot be invested with the high and sacred prerogative of levying and collecting taxes. As is stated by Sanborn, circuit judge, as

the organ of the court in *Dodge vs. Township of Mission* 46 *C. C. A.*, 661 ; 107 *Fed.*, 827 ; 54 *L. R. A., at page* 242 : "The legislative power of taxation and power of eminent domain are alike limited to the exercise thereof for *public* objects, and they cannot be successfully prostituted for private purposes. For the same reasons the power of legislature to create or to authorize the creation of a public debt, and the issue of public bonds to be paid by taxation, is subject to the same limitation. * * * * * Taxation is a mode of raising revenue for *public purposes*. When it is prostituted to objects in no way connected with the public interests or welfare, *it ceases to be taxation, and becomes plunder*. * * * * * * Speaking generally, a public purpose is a *governmental* purpose, one of the purposes for which governments are instituted and maintained among men, such as the maintenance of order, the prevention and punishment of crime, *the care of highways*, the relief of the destitute, the education of youth, the erection of buildings for the use of schools and of the officers of the government ; while a private object is one which is ordinarily sought and attained by individuals or private associations of individuals, such as the cultivation of the soil, the manufacture of useful and attractive articles, the purchase and sale of merchandise, and the thousand and one purposes which enlist individual enterprise and energy in a complex and advancing civilization. * * * * * No argument is required to show that the erection of sugar mills, which directly benefit only those who own them and which indirectly assist only those who raise sorghum cane, is no such public object as the *construction of railroads*, our chief means of transportation, whose rates are regulated by law, which may be used by every citizen for a reasonable compensation, and which are of universal benefit." The Township of Ninety Six, therefore, having been created to aid in the accomplishment of a *governmental purpose*, to wit, the "building of a highway," and being clothed with the exercise of *governmental functions*, to wit, the levy, assessment and collection of taxes, has all of the essentials of

a *governmental* agency and *none* of the requisites of a private corporation. In *Floyd vs. Perrin supra*, the Supreme Court of South Carolina declared the act now under consideration unconstitutional for the reason that the building of a railroad is not a "corporate purpose." This court reversed the said decision upon the ground that this *was* a governmental agency and the building of this railway *was* a corporate or governmental purpose. It is hardly to be believed that petitioners can now induce this court to reverse its position for which they contended in *that* case, but which they *now* seek to repudiate because it does not suit their *present* purpose. This position, however, is clearly untenable under the authority of *Barkley vs. Levee Commissioners* supra. In that case, it will be observed the corporation was created for the *sole* purpose of building levees. The legislature authorized the corporation to issue evidences of indebtedness in payment for work done. This court sustains an act of the leislature abolishing the corporation although it left the creditors without remedy. There is no distinguishing the two cases. But why should the obligation of a creditor of a municipal corporation with only *one* governmental purpose be more sacred than the obligation of a creditor of a municipal corporation with a *dozen* governmental purposes? Why should the bond of the Township of Ninety Six in Greenwood County be more sacred in the eye of the Federal Constitution than the bond of the City of Memphis, Tenn.? The only expression which we have been able to find which gives any color to this contention is an extract from an opinion by Mr. Justice Field in *Broughton vs. Pensacola*, 93 *U. S. at page* 269, where he says "Although a municipal corporation, so far as it is in-
"vested with subordinate legislative powers for local purposes,
"is a mere instumentality of the state for the convenient
"administration of government, yet when authorized to take
"stock in a railroad company, and issue its obligations in
"payment of the stock, it is to that extent to be deemed a
"private corporation, and its obligations are secured by all

"the guarantees which protect the engagement of private in "dividuals." This extract is quoted in the subsequent case of *Mobile vs. Watson*, 116 *U. S. at page* 305, and by Judge Simonton in *Hicks vs. Cleveland*, 106 *Fed. Rep. at page* 466.

It will be observed, however, that in neither of these cases was the court dealing with a case where the corporate existence of the municipality had been destroyed, for in the opinion of Mr. Justice Field from which this excerpt is taken, the following language may be found: "It is not necessary, "however, in the view we take of the proceeding for the re-"organization of a city government *to consider the effect of* "*an absolute repeal of the charter of a municipal corporation* "*upon its obligations.* It is sufficient that here, in our judg-"ment, there was a continuation of the corporation of Pen-"sacola, with its original rights of property and obligations, "not a new and distinct creation of corporate capacity and "liability." But in the subsequent case, however, of *Meriwether vs. Garrett in* 102 *U. S.*, the court of which Mr. Justice Field was a member *did* have occasion "to consider the effect of an absolute repeal of the charter of a municipal corporation upon its obligations," and he wrote the opinion of the majority of the court in that case *sustaining* the act repealing the charter of the City of Memphis. That this excerpt relied upon does not correctly set forth the views of Mr. Justice Field will also appear from what immediately follows. This is the next sentence to that above quoted: "The inhibition of "the Constitution, which preserves against the interference "of a state the sacredness of contracts, applies to the lia-"bilities of municipal corporations created by its permission; "*and although the repeal or modification of the charter of a* "*corporation of that kind is not within the inhibition, yet* "*it will not be admitted where its legislation is susceptible of* "*another construction, that the state has in this way sanc-*"*tioned an evasion of or escape from liabilities, the creation* "*of which it authorized.* When, therefore, a new form is "given to an old municipal corporation, or such a corpora-"tion is re-organized under a new charter taking in its new

" organization, the place of the old one, embracing substan-
" tially the same corporators and the same territory, it will
" be presumed that the legislature intended a continued ex-
" istence of the same corporation, although different powers
" are possessed under the new charter, and different officers
" administer its affairs," etc. By the language italicized above, it will appear that in the very next sentence to the one relied upon to sustain petitioner's contention, Mr. Justice Field *recognized* the principle for which we contend, and that the said excerpt, isolated as it is from what immediately follows does not correctly set forth the views of this distinguished jurist. If there should be any doubt, however, as to this matter, it is entirely removed by referring to the case of *Mount Pleasant vs. Beckwith*, 100 *U. S., page* 514. This case belongs to our classification No. 2, supra. It decides "Where a municipal corporation is legislated out of exist-
" ence and its territory annexed to other corporations, the
" latter, unless the legislature otherwise provides, become en-
" titled to all its property and immunities, and severally lia-
" ble for a proportionate share of all its then subsisting legal
" debts and vested with its power to raise revenue where-
" with to pay them by levying taxes upon the property trans-
" ferred and the persons residing thereon.

" The remedy of the creditors of the extinguished cor-
" poration is in equity against the corporations succeeding to
" its property and powers."

Mr. Justice Clifford delivered the opinion of the majority of the court, and at page 529 quoted the excerpt from the opinion of Mr. Justice Field in *Broughton vs. Pensacola, supra.* The court decided, nevertheless, *that the old corporation was extinguished.* At page 530, it says, "Cases doubtless may arise when the party cannot collect what is due under the contract; but he ought always to be able by some proper action to reduce his contract to judgment." And then the court expressly recognizes the principle for which we now contend by saying "extinguished municipal corporations
" neither own property nor have they any power to levy taxes

" to pay debts. Whatever power the extinguished munici-
" pality has to levy taxes when the act passed annulling her
" charter terminated," and a majority then proceeded to hold the other corporation liable. Mr. Justice Miller, Mr. Justice Field and Mr. Justice Bradley *dissented* upon the ground stated by Justice Miller, "that it requires legislation to make a legal obligation against a new town and to make the apportionment of the debt. And I dissent on that ground from the judgment and opinion of the court in this case." It, therefore, appears that in that case Mr. Justice Field was of the opinion that the creditor was *entirely without remedy*, notwithstanding the extract from his opinion in Brougbton vs. Pensacola quoted in the majority opinion.

But says the Circuit Judge in his decree at folio 24, "If
" the contention that the legislature had the right to destroy
" the corporate existence of the township be true, we are,
" nevertheless, confronted with the fact that the instrumen-
" talities and means employed by the legislature in this in-
" stance for the purpose of enforcing the collection of a tax
" are still unimpaired. . . . . *The County Auditor and*
" *Treasurer are not officers or agents of the township in any*
" *sense of the word.*"

We have already endeavored to show that if *this* position be correct that the petition for mandamus should have been refused for the reason that under Article 9, Section 8 of the Constitution of 1868 and act passed in pursuance thereof authorizing the issue of these bonds only "the corporate *authorities*" of the township could be vested with the power to assess and collect the said taxes. If the county auditor and treasurer are not constituted the corporate authorities for said *township* by the said act, then they can only be required to discharge these duties as officers and agents of the *state*. Either the legislature delegated to this *municipality* the right and duty to levy and collect the taxes to pay these bonds, as held by the Supreme Court of South Carolina in *Floyd vs. Perrin, and Construction Co. vs. Congaree Township*, supra, and as to *this* point concurred in by this court in *Folsom vs.*

Ninety-Six, supra, in which case the tax must be assessed and collected by the "corporate authorities," or the legislature *itself* directly pledged the taxing power of the state to the bond holders, and undertook that the said taxes should be collected by her regular officials, to wit, the county auditor and county treasurer. While these officers are denominated county officers, they are in reality state officers, since they are appointed by the governor and are not elected by the people of the county, and it is their duty to assess and collect both state and county taxes.

As to the appointment of the county auditor see *Section* 339, *Code of Laws of South Carolina*, 1902, *Vol.* 1. As to the appointment of county treasurer see same volume, *Section* 392. Both the county auditor and county treasurer are subject to suspension and removal from office by the governor (*see Section* 393.) So then the effort, on the part of these creditors in this view of the case, is to compel the *state* through *its* officers to carry out *its* obligation to them. A cause of action exists in favor of one party and against another where a legal duty is owing to the one by the other and he fails to discharge that duty; so here it would be the duty of the state, if it had pledged the taxing power in behalf of these creditors, through its regular channels and by its regular officers and agents to assess and collect the tax which *it* had thus pledged, and if it failed to do so the proceedings against *its* officers or agents would be in effect a suit against the state which is violative of the amendment to the Federal Constitution.

In *Louisiana vs. Jumel, 107 U. S., at page 711*, an act of the legislature, as well as a Constitutional Amendment, provided for the issue of bonds in exchange for valid outstanding bonds and the levy and collection of a tax to meet the same. Thereafter, a new Constitution was adopted, the effect of which was to forbid "The payment of the interest due January, 1880, and withdrew from the officers of the the state the means of carrying her contract into effect." In mandamus proceedings against the officers, the Supreme Court

of the United States held, "that the execution of the contract cannot be enforced, nor the relief sought be awarded in a suit to which she (the state) is not a party, but which is brought against officers who are merely obeying the supreme political power of the state" (it will be remembered that in this case there is an act of the legislature forbidding these officers from assessing or collecting this tax). This case is followed and reaffirmed in *Hagood vs. Southern*, 117 *U. S., at page* 52, the Court deciding, "when a suit is brought in a court of the United States against officers of a state to enforce performance of a contract made by a state and the controversy is as to the validity and obligation of the contract, and the only remedy sought is the performance of the contract by the state, and the nominal defendants have no personal interest in the subject matter of the suit, but defend only as representing the state, the state is the real party against whom the relief is sought, and the suit is substantially within the prohibition of the 11th section, 11 Amendment to the Constitution of the United States."

In order to constitute a suit against a state, it is not necessary that the state should pledge the taxing power to the payment only of its *own* obligations; it is perfectly competent for her to pledge the taxing power to the payment of the obligations of one of her municipalities, and if she were to thereafter fail to carry out the pledge, an effort to compel her officers or agents to do so would, we submit, be none the less a suit against the state. In the case of Hagood vs. Southern supra, at page 69, the court uses this language: "If this case is not within the class of those forbidden by the constitutional guarantee to the state of immunity from suites in several tribunals, it is difficult to conceive the frame of one which would be. If the state is named as a defendant, it can only be reached either by mesne or final process through its officers and agents and a judgment against it could neither be obtained or enforced except as the public conduct and government of the ideal political body called a state could be reached and effected through its official representatives. A

judgment against the latter, in their official and representative capacities, commanding them to perform official functions on behalf of the state according to dictates and decrees of the court, is, if anything can be, a judicial proceeding against the state itself. If not, it may well be asked, what would constitute such a proceeding?" The courts have decided, however, that where the officers of the state are required only to perform a *ministerial act authorized by law* and refuse to perform such act, such for instance as accepting coupons for taxes, the court can entertain jurisdiction to compel the performance of such duty. See *Rolston vs. Missouri Fund Commissioners*, 120 *U. S., at page* 411, where the court thus states the distinction: "It is next contended that this suit cannot be maintained because it is in its effect a suit against the state which is prohibited by the 11th amendment of the Constitution of the United States and *Louisiana vs. Jumel*, 107 *U. S.* 711 is cited in support of this position. But this case is entirely different from that. There the effort was to compel a state officer to do what a statute *prohibited* him from doing. Here the suit is to get a state officer to do what a statute *requires* of him. The litigation is with the *officer*, not the state. The law makes it his duty to assign the liens in question to the trustees when they make a a certain payment. The trustees claim that they have made this payment. The officer says they have not, and there is no controversy about his duty if they have. The only inquiry is, therefore, as to the fact of the payment according to the requirements of the law. If it has been made, the trustees are entitled to their decree." See also Christian vs. Atlantic & N. C. Railway Co., 133 U. S., 233. The case of Parsons vs. Marye, 23 Fed. Rep. 113, decides that a Federal Court has jurisdiction over a state officer, in questions arising under the Constitution, laws, et cetera, of the United States, where the law had imposed upon him the well-defined duty in regard to this specific matter *not affecting the general powers or functions of government*, but in the performance of which one or more individuals have a distinct interest capa-

ble of enforcement by judicial process," recognizing the distinction drawn in Hagood vs. Southern supra. In this case the officer refused to accept coupons in payment of license taxes as was his dnty under the law. In the case of *Hans vs. State of La. 24 Fed. Rep. page 55*, it is stated : "Good public reasons founded on the distribution of powers in constitutional governments, make *the power to compel states to pay their money obligations political and not judicial.*" In the case of *Yale College vs. Sanger, 62 Fed. Rep. 177*, it is decided, "A Federal Court cannot take jurisdiction of a suit against the state officer to compel or coerce the state to perform its obligations or abide by its contracts, when the officer has neither committed nor threatened to commit an injury to the property of complainant, but may take jurisdiction of a suit against an officer who, under the authority of an unconstitutional statute has attacked or threatened to attack and injure the vested pecuniary rights of complainant in his property." In the case of *Smith vs. Radcliffe, 87 Fed. Rep.*, at page 966, the authorities upon this question are cited, and the 11th amendment is applied. The following language from in re *Aires* 123 *U. S.., page* 443 is quoted with approval, "In this spirit, it must be held to cover not only suits brought against a state by *name* but those *also against its officers, agents and representatives, where the state, though not named as such, is, nevertheless the only real party against which alone, in fact, the relief is asked*, and against which the judgment or decree respectively operates."

So then the logic is irresistible that either we have here a case where the legislature *itself* has *directly* undertook to levy a tax and authorized its collection through *its* officers and agents to pay these bonds, which it now *refuses* to do and this proceeding is an effort on the part of the bond holders to compel the state to perform this obligation, in which event it is in effect a suit against the state and violative of the Federal Constitution, or it is a case where the state has *delegated* the power of taxation to one of its municipalities to be exercised through its agents, which municipality has

been extinguished, and there is therefore no longer in existence any officer or agent upon whom the court can lay its hands. In fact, it is an effort to compel a defunct corporation to levy and collect taxes, which is both a legal and physical impossibility.

In *Grantland vs. the City of Memphis*, 12 *Federal Reporter*, 290, the following language may be found: "It is said in *Nat. Bank vs. Golby*, 21 *Wall*, 609, that a corporation dissolved becomes a defunct institution and a judgment can be no more rendered against it than could be rendered against a dead man dying pendente lite."

If, however, the case is one where the state has clothed a municipal corporation with powers of taxation and has required the performance of such duties at the hands of some body else *other* than the "corporate authorities," as required by the Constitution of 1868, then the said act for this reason is unconstitutional and the petition, as to these plaintiffs in error, should have been dismissed.

But again, the Constitution of 1895, Article 10, section 13, provides "the taxes for the sub-division of the State shall be levied and collected by the respective fiscal authorities thereof."

We have endeavored to show that neither under the act in question or the general law are the "county treasurer" and "county auditor" the fiscal agents of the Township of Ninety-Six. *Section* 11, *Article* 7, *of the Constitution of* 1895, provides among other things. The General Assembly may provide such system of township government as it shall think proper in any and all the counties, and make special provision for municipal government for the protection of chartered rights and powers of municipalities." In pursuance of this section, the General Assembly of South Carolina by act approved the 25th day of February, 1902. (See Acts 1902, 23 *Statute at Large, page* 1181), provided as follows:

"From and after the approval of this act, the governor shall appoint a township assessor for such townships in Greenville County, Laurens County and Greenwood County, as are

now, or may hereafter be required to pay taxes for corporate purposes, whose term of office shall be co-terminal with that of the governor. It shall be the duty of said township assessor to assess and levy, on behalf of the township represented by him, all taxes authorized by law against such township, said tax to be laid upon the returns of property from said township as shown in the auditor's office for the Counties of Greenville, Laurens and Greenwood, said township assessor shall be paid for his services $2.00 per day for not exceeding five days in each year.

Sec. 2. The governor shall also appoint for such township a township collector, whose term of office shall be co-terminal with that of the governor; and whose duty it shall be to collect such tax at the time and in the manner that State and County taxes are collected. He shall be allowed the same commissions as are allowed county treasurers, and shall enter into bond in the sum of $2,000.00 for the faithful performance of the duties of his office.

Sec. 3. All duties now imposed by law upon the County Board of Commissioners, the county auditor and county treasurer, as corporate agents of such townships, are hereby imposed upon the township assessor and township collector, who are hereby constituted and appointed for all purposes the corporate agents of said township (townships).

Sec. 4. That all acts or parts of acts inconsistent with this act be, and the same are hereby, repealed."

Sec. 2, Article 2, of the Constitution of 1905, provides among other things:

"No person shall hold two offices of honor or profit at the same time: provided, that any person holding another office may at the same time be an officer in the militia or a notary public."

It will thus appear that both the Constitutions of 1868 and 1905, and the Act passed in pursuance of the provisions of the latter Constitution, contemplate the appointment of "corporate authorities" to represent the municipality in the levy and collection of taxes for corporate purposes. Sepa-

rate and distinct offices are contemplated. To hold, therefore, that the county auditor and county treasurer may be chargeable with these duties also would be to permit these parties to hold *two* offices—to represent two separate and distinct principals in violation of the Constitutional provision of 1905, supra.

In *Folsom vs. Greenwood Couuty*, (*C. C. A* 137 *Fed. Rep., at page* 449), the opinion of the court was delivered by the same learned judge who delivered the decree appealed from in this proceeding. In that case, the court had under consideration, the identical act, constitutional amendment and issue of bonds now in question, and the defendants in error here, were the plaintiffs in error in that case. The action was brought against *Greenwood County* upon the theory that the Constitutional Amendment now in question *was effective* and that the corporate existence of the Township of Ninety-Six *was* destroyed and that it, therefore, had *no* corporate agents against whom the plaintiffs in error in that case, and the defendants in error in this, might proceed, and, *therefore*, under the cases of *Broughton vs. Pensacola*, supra and *Mount Pleasant vs. Beckwith*, supra, the *County of Greenwood* became liable as trustee for said township.

Says the Court at page 452: "The act of the legisla-
" ture in the first instance, constituting the County Commis-
" sioners of Abbeville County as the agents of Ninety-Six town-
" ship for the purpose of signing and delivering the bonds au-
" thorized to be issued thereunder, and the acceptance and
" acquiescence on their part as the agents of the county by
" exercising the power conferred, was a contract with the
" bond holders that such *county*, through its duly constituted
" agents, would act as a trustee for such township for the
" purposes therein contemplated. The fact that the system
" of county government in that state has been radically
" changed cannot relieve the people of Ninety-Six township
" from the payment of the obligation thus assumed, nor the
" County of Greenwood from the obligation which originally
" rested on the County of Abbeville, to wit, from acting as

" the trustee of the township against whom suit could be in-
" stituted for the purpose of obtaining a nominal judgment,
" to be ultimately discharged by the assessment and collec-
" tion of a sufficient tax by the Auditor and County Treasur-
" er on the property of the people of such territory for the
" payment of any judgement which might be thus obtained."

This court may be able to reconcile the two cases. We are unable to do so. It seems to us that the decision of the court (C. C. A.) in *Folsom vs. Greenwood County* if correct renders a reversal of the decree in this case necessary.

If this decree be reversed, it does not necessarily follow that the creditors *are* "without remedy," as suggested by the Circuit Judge. But even if this result could follow, in order to avoid it, this court will not do violence to well known principles of law. As said by this court in *Heine vs. Levee Commissioners*, supra, "there does not appear to be any authority founded on the recognized principles of a court of equity on which this bill can be sustained. If sustained at all, it must be on the very broad ground that because the plaintiff finds himself unable to collect his debt by proceedings at law, it is the duty of a court of equity to devise some mode by which it can be done. *It is, however, the experience of every day and of all men, that debts are created which are never paid, though the creditor has exhausted all the resources of the law. It is a misfortune, which, in the imperfection of human nature, often admits of no redress. The holder of a corporation bond must in common with other men submit to this calamity, when the law affords no relief.*" (Italics mine).

But in contemplation of law *are* these creditors without remedy? We answer in the language of Judge Brawley in his opinion sustaining the defendant's demurrer to the complaint in *Folsom vs. Greenwood County*, supra, (see 130 *Fed. Rep., page* 730)."

"The corporation which issued these bonds has ceased to exist. Its officers have been removed by the authority of the state, and no provision has been made by the state for

the settlement of its indebtedness. This court cannot presume that the state will refuse, upon proper representation, to provide some remedy."

Jos. A. McCullough,
For Plaintiffs in Error.

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Supreme Court of the United States

OCTOBER TERM, 1905.

No. 108.

T. A. GRAHAM, COUNTY AUDITOR FOR GREENWOOD COUNTY, AND J. A. MARSHALL, COUNTY TREASURER OF GREENWOOD COUNTY, SOUTH CAROLINA, PLAINTIFFS IN ERROR,

vs.

S. ELLEN FOLSOM, JENNIE F. PECK, AND NANNIE F. McCANLESS.

BRIEF OF R. E. L. MOUNTCASTLE AND H. J. HAYNSWORTH, ATTORNEYS FOR DEFENDANTS IN ERROR.

THE STATE COMPANY, LAW PRINTERS, COLUMBIA, S. C.

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STATEMENT OF FACTS.

By an act passed in 1882 the Greenville and Port Royal Railroad Company was incorporated, and in order to aid in its construction, the act provided that counties, townships, cities and towns interested in its construction should be allowed, upon a vote of the people living therein, to subscribe to the capital stock of the railroad and to issue bonds in payment. The act provided that on the petition of the majority of the real estate owners the County Commissioners were authorized to order an election within the county or township on the question of subscription, and if such election were favorable, the Board of County Commissioners were directed as agents of the township or county to issue bonds in the amount determined on.

Section 9 of said act provided as follows:

"That for the payment of interest on such bonds as may be issued by the said counties, cities, towns or townships, the County Auditor, or other officer discharging such duties, or the city or town Treasurer, as the case may be, shall be authorized and required to assess annually upon the property of such city, town, county, or township such per centum as may be necessary to pay said interest or said sum of money subscribed, which shall be known and styled in the tax book as said railroad tax, which shall be collected by the Treasurer under the same regulations as are provided by law for the collection of taxes in any counties, cities, towns, or townships so subscribing, and which shall be paid over by the said Treasurer to the holder of said bonds as the said interest shall become due, on presentation of the coupons, which said coupons shall be reported to the County Commissioners by the said Treasurer, or to the Council of any city or town where there are coupons from bonds of such city, or town, and all said coupons shall be cancelled by the County Treasurer as soon as they are paid by them."

At this time townships in South Carolina were unincorporated territorial subdivisions of the county. The act of 1882 did not attempt to erect the interested townships into corporations, but this apparent omission was cured by the act of 1885, which amended the previous act by changing the name of the railroad company and by declaring as follows:

"That for the purpose of this act, all the counties and the townships in said counties, along the line of the said railroad, or which are interested in the construction as herein provided for, shall be, and they are hereby, declared to be bodies politic and corporate, and vested with the necessary powers to carry out the provisions of this act, and shall have all the rights and be subject to all the liabilities in respect to any rights of causes of action growing out of the provisions of this act, the County Commissioners of the respective counties are declared to be the corporate agents of the counties or townships so incorporated and situate within the limits of the said counties."

On March 25, 1886, the County Commissioners of Abbeville County (wherein Ninety-Six Township was then situate), upon a vote of the people of that township, issued bonds aggregating

twenty-eight thousand dollars, with attached interest coupons. George W. Folsom purchased a portion of these bonds, and, having entered suit upon past due coupons in the Circuit Court of the United States for the District of South Carolina, he, on August 14, 1896, recovered a judgment against the township for seven thousand, one hundred and ninety-three dollars, and one hundred and ninety-three and 15/100 dollars as costs. Execution was duly issued and a return of *nulla bona* was made by the marshal. Demand was then made upon the County Auditor and County Treasurer to assess and collect the tax to pay the judgment. On the refusal of these officers to discharge this duty, this application for mandamus was made.

The application was resisted mainly upon the ground that since the issue of the bonds, to wit: in 1903, the corporate existence of Ninety-Six Township was, by a constitutional amendment, abolished, and all corporate agents removed.

Circuit Judge Pritchard, who heard the case, held (1) that the attempted dissolution of the township was merely an effort to impair the obligation of the contract, and therefore inoperative as to these bondholders; (2) that the machinery for collecting the tax was independent of the corporate existence of the township and hence was not affected by its dissolution. The writ of error questions these propositions.

It will throw light upon these questions to give

A BRIEF HISTORY OF TOWNSHIP BONDS IN SOUTH CAROLINA.

The bonds in question were issued under the act of 1882, amended in 1885. This was one of a long series of statutes adopted by the Legislature of South Carolina between the years 1870 and 1880, incorporating railways and providing that counties and townships might subscribe to the stock and issue bonds in aid thereof. At this period townships were not incorporated, but were merely territorial subdivisions of the county. Each of this series of acts declared the townships corporations for the purpose of the act and liable to suit on the bonds. Under these acts a large number of township bonds had been issued and sold in the market.

In November, 1888, the Supreme Court of South Carolina rendered a decision to the effect that such statutes were unconstitutional, basing this conclusion upon the proposition that the constitution restricted the power to contract debts to corporate purposes, and that the townships, although erected into corporations, were not vested with a corporate purpose. Floyd vs. Perrin, 30 S. C. 1.

In coming to this conclusion, the Supreme Court admitted that railways are public highways, and that the power of taxation may be employed for their promotion. The decision was a great shock to the people of the State, and at the very next session of the Legislature an act was passed declaring that when the railroad had been completed through the township the bonds issued in aid thereof should be paid by taxation as provided in the original act. XX Statutes of S. C., page 12.

The Supreme Court, with manifest inconsistency, held this statute unconstitutional, and declared that mandamus could issue to compel the collection of the tax for the payment of township bonds wherever the railway was completed through the township. State vs. Whitesides, 30 S. C. 579; State vs. Harper, 30 S. C. 586; State vs. Neely, 30 S. C. 587.

These decisions gave protection to the larger part of the township bonds. Those bonds, however, which had been issued by townships through which the railway had not been completed were rendered invalid under the decision of Floyd vs. Perrin.

The practical result of these decisions was that the question as to whether the bonds were obnoxious to the constitution of the State was to be determined by the question as to whether or not the railway had been completed. This result is the more important when we consider that the only constitutional clause invoked was that which declared that corporate debts might be contracted for corporate purposes.

The matter thus stood until February 10, 1893, when George W. Folsom brought suit against Ninety-Six Township upon certain coupons clipped from bonds which had been issued by it. A demurrer was filed in behalf of the township, and Judge Simonton, on December 20, 1893, sustained the demurrer and dismissed the complaint. This case was then carried to the Circuit Court of Appeals, which certified certain questions of law to the Supreme Court of the United States. That court, in the fall of 1895, rendered a decision in which it declared that

the decision in Floyd vs. Perrin, having been rendered subsequently to the bonds in question, was not binding on the federal courts, and that, considering the question upon its merits, the court regarded the statute as constitutional and the bonds valid. The demurrer was consequently overruled, and the defendant was allowed to file an answer.

The case came on for trial in the Circuit Court, and resulted in a verdict for the plaintiff. It was then carried to the Circuit Court of Appeals, and the judgment below was affirmed. 30 C. C. A. 657.

In the meantime other cases had been instituted against various townships, and judgment was obtained in each case. A writ of error was sued out in some of the cases, and the judgment below was affirmed. Dunklin Township vs. Wells, 31 C. C. A. 593.

These decisions terminated the litigation on the merits. In 1897 and 1899 acts were passed by the Legislature forbidding township commissioners and county commissioners and all other officers from assessing tax to pay these bonds, and forbidding the County Treasurer and other officers from collecting such tax.

22 Statutes of S. C. 788.

Under the authority of these statutes the Auditor and Treasurer declined to levy and collect the tax as required by the Statutes of 1882 and 1885, and the plaintiff in one of the cases filed a petition for a writ of mandamus requiring the performance of these duties. This case was heard on circuit by Judge Brawley, who directed the issue of the writ. The matter was then carried to the Circuit Court of Appeals and the judgment below was affirmed. Hicks vs. Cleveland, 45 C. C. A., 429.

Judge Simonton, who delivered the opinion of the above case, said, among other things:

"The purpose of the General Assembly in passing the act to amend the charter of the Greenville and Port Royal Railroad Company, approved December 24, 1885 (19 Stats. at Lg. S. C., p. 237), was to promote the construction of that road; to accomplish this, it authorized and encouraged townships along the proposed line of road to subscribe bonds towards this construction. In order to give character and credit to these bonds, and

to induce the public to invest in them, the 9th section of the act provides a careful, full and sure mode of providing for the interest. And an amendment to the same charter made in 1887 provided (19 Stats. Lg. S. C., p. 921) in the same way for the payment of the principal by taxation. These provisions of the act went into, and formed a part of, the contract moving to the bondholders, who invested their money trusting to the provisions. The contract could not be impaired by any subsequent act on the part of the State of South Carolina."

Having failed to make good their defense in the Federal courts, the next step was an application to the Supreme Court of South Carolina. In the fall of 1901 certain taxpayers of Dunklin Township filed a petition in the court asking that an injunction issue against the County Treasurer and Auditor, forbidding them to levy and collect the tax to pay the judgment which had been rendered by the Federal court, and on which that court had directed mandamus to issue. The Supreme Court of the State, on April 16, 1902, rendered its decision, holding that mandamus was in the nature of an execution to enforce a judgment of the Federal Court, and declaring that this "was an end of the argument, as it cannot be contended that a State court can enjoin any process of a Federal court." McCullough vs. Hicks, 63 S. C. 542.

In the meantime, and before the rendition of this decision, it occurred to those persons who were seeking to avoid the payment of the township obligations that a dissolution of the corporate existence might operate to prevent the collection of the bonds.

It will be remembered that the act of 1885 had declared townships which desired to issue bonds in aid of the railway to be corporations for the purposes of that act and liable to suit.

The State Constitution of 1895, Section 11, Art. VII, provided as follows:

"Each of the several townships of this State, with names and boundaries, as now established by law, shall constitute a body politic and corporate, but this act shall not prevent the General Assembly from organizing other townships or changing the boundaries of those already established; and the General Assembly may provide such system of township government

as it shall think proper in any and all the counties, and may make special provision for municipal government and for the protection of chartered rights and powers of municipalities."

On February 28, 1902, the following amendment to the above section was proposed by a concurrent resolution of the Legislature:

"That this section shall not apply to the following townships in the following counties: Dunklin and Oaklawn in the County of Greenville; the townships of Cokesbury, Ninety-Six and Cooper in the County of Greenwood; Sullivan in the County of Laurens; Huitt and Pine Grove in the County of Saluda. The corporate existence of the said townships be, and the same is hereby destroyed, and all officers in said townships are abolished and all corporate agents removed."

23 Statutes of S. C., p. 1227.

This amendment was voted upon favorably at a general election held in November, 1902, and was adopted by the General Assembly in February, 1903. Thus it became a part of the State Constitution.

The question we have to deal with in this case is as to the effect of this amendment. Does it destroy the capacity of being sued vested by the act of 1885? If so, does this prevent the court from setting in motion the machinery for the collection of this tax?

I.

Has the constitutional amendment of 1903 destroyed the capacity of being sued vested in the townships by the act of 1885?

It should be borne in mind, (1) that when the act of 1885 was passed townships were unincorporated territorial divisions of the county; that act authorized the issue of the bonds, and to give them validity and provide a remedy thereon declared the townships corporations for the purpose of the act and liable to suit on the bonds. Incorporated and rendered liable to suit solely for the purpose of the act, these provisions became a part of the contract of the bondholders. (2). The Constitution of 1895 sought to erect the townships of the State into municipal

corporations, making provision for a full corps of township officers. (3). The constitutional amendment of 1903 excepted Ninety-Six and certain other townships from this constitutional provision, declaring these townships dissolved as corporations, and their officers abolished.

Under this situation, two questions naturally arise, to wit: (1) whether the constitutional amendment was intended to operate upon the status created by the act of 1885 and to exempt specified townships from liability to suit upon these bonds; (2) if such be the purpose, whether it can become effective under the constitutional provision protecting contracts from impairment.

We will first discuss the question:

Whether the constitutional amendment was intended to exempt the townships from liability of being sued upon the bonds.

It is a cardinal rule of construction that statutes and constitutions are to be interpreted so as to avoid any construction affecting past transactions, and especially any construction tending to impair the obligation of a contract.

The amendment of 1903, without doing violence to its language, can be construed as applying to the general corporate life and government provided by the Constitution of 1895, which it purports to amend.

We will concede, for the sake of argument, that the purpose of the introduction of the amendment was to deprive the bondholders of all remedy. But this purpose is not to be attributed to the Legislature or to the people. On the other hand, it is to be assumed that they did not intend to destroy the remedy of the bondholders nor to take from them any rights created by the contract.

Prior to the Constitution of 1895 the only function retained by the township after the issue of the bonds was the capacity of being sued upon these bonds. It was without power to enter into new transactions or do any further act involving the exercise of corporate power. The only capacity retained was that of being sued on the contract issued under the act of 1885.

The amendment, when properly construed, would have the effect of abolishing general corporate life, but leaving the bondholders the right to proceed against the township as an entity.

The view here presented is in harmony with the general doctrine touching the dissolution of corporations. The Legisla-

ture usually provides that corporations upon going into liquidation shall continue to be liable to suit. Under these statutes it has been held that, although general corporate life is destroyed, creditors may bring suit and secure a judgment. The courts, always anxious to protect the rights of creditors, will resort to all means within their power to provide a remedy for the creditors of dissolved corporations if the Legislature does not ask some other provision.

Greenwood vs. R. R., 105 U. S. 13.

If the Amendment was Intended to Deprive the Bondholders of Their Right to Sue the Townships, the Question Would Arise Whether Such Purpose Can Become Effective Under the Constitutional Inhibition Against the Impairment of the Obligation of Contracts.

We concede the general doctrine that the State may, at its will, dissolve municipal corporations, and the fact that creditors may be left without a remedy does not prevent the exercise of such power.

We insist, however, that this doctrine does not apply to the present case. The power of the State to dissolve cities, towns and other municipalities created for the purpose of aiding in local government is founded upon the right to regulate and control its political and governmental functions.

"The right of the State to change these institutions is not founded on their being incorporated, but on their being instruments of government created for this purpose."

Dartmouth College vs. Woodward, 4 Wheat. 638.

The doctrine has no proper application where a community is erected by the Legislature into a corporation merely to enable it to enter into a contract supposed to be beneficial for its local interests, and to provide a remedy thereon. Especially is this true where the incorporating act stipulates that the community shall be liable to suit on its contracts so authorized. No doctrine of public policy requires that the State reserve the power to deprive creditors of the stipulated right of suit. By passing the statute the State itself proposes the terms of the contract and pledges public faith to its redemption. In such a case the liability of the community to be sued as an entity continues until the contract itself is discharged.

By the acts of 1882 and 1885, under which the bonds were issued, the townships were vested with no political powers or duties. The sole purpose of their incorporation was to enable them to enter into a contract supposed to be beneficial to their local interests and to provide the bondholders with a means of enforcing such contract.

In Broughton vs. Pensacola, it is said:

"Although a municipal corporation, so far as it is vested with subordinate legislative powers for local purposes, is a mere instrumentality of the State for the convenient administration of government, yet when authorized to take stock in a railroad and issue its obligations in payment of the stock, it is to that extent to be deemed a private corporation, and its obligations are secured by all the guaranties which protect the engagements of private individuals. The inhibition of the Constitution, which preserves against the interference of the State the sacredness of contracts, applies to liabilities of municipal corporations created by its permission."

Broughton vs. Pensacola, 93 U. S. 266.

In Port of Mobile vs. Watson, 116 U. S. 305, we find the following language:

"When municipal corporations are empowered to take stock or otherwise aid in a railroad company, and they issue bonds in payment of the stock taken, or to carry out any other authorized contract in aid of the railroad company, they are to that extent deemed private corporations, and their obligations are secured by all the guaranties which protect the engagements of private individuals. Therefore the remedies for the enforcement of such obligations must be left unimpaired by the Legislature, and if they are changed a substantial equivalent must be provided."

The doctrine is thus presented by Judge Dillon:

"It assists to an understanding of the extent of legislative power over municipal corporations proper (over towns and cities) to observe that these, as ordinarily constituted, possess a double character, the one *governmental, legislative* or *public,*

the other in a sense *proprietary* or *private*. The distinction between these, though sometimes difficult to trace, is highly important. * * * In its governmental or public character, the corporation is made by the State one of its instruments, or the local depository of certain limited and prescribed political powers to be exercised for the public good on behalf of the State rather than for itself. * * * But in its proprietary or private character, the theory is that the powers are supposed not to be conferred primarily or chiefly from considerations connected with the government of the State at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual, and as to such powers and to the property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded *quo ad hoc* as a private corporation, or at least not public in the sense that the power of the Legislature over it, or the rights represented by it, is omnipotent."

1 Dillon Mun. Corp. Sec. 66.

Prior to the act of 1885, townships were not municipal corporations.

Floyd vs. Perrin, 30 S. C. 1.

The statute chartered the railroad, and to promote its construction, authorized townships to issue bonds. In order to issue the bonds and to give them credit and thus induce the public to invest in them, a full and sure mode of providing for their payment by taxation was adopted, and the statute further declared that "for the purposes of this act" the townships are corporations. The sole corporate powers vested in the corporations thus created was "to carry out the provisions of this act." It was further declared in the act that the townships should be "subject to all the liabilities in respect to any rights or causes of action growing out of the provisions of this act." So that we have here, not a general municipal corporation, but the case of a community erected into a corporation, merely for the purpose of enabling it as an entity to issue community bonds to be paid by community taxes and liable to suit upon these bonds. Every provision contained in the statute entered into the contract with the bondholders. Those provisions providing for suit upon the bonds and for their payment by taxation

were an essential part of the contract, and were beyond the recall of the State.

The power of taxation is in its nature governmental or political. But it is well established that this power, when conferred upon a community, for the purpose of enabling it to enter into contracts, cannot be impaired by the State.

On the other hand, corporate capacity in its nature is not a governmental or political function, but becomes so only when conferred for governmental or political purposes.

Darmouth College vs. Woodward, 4 Wheat. 638.

It follows, therefore, that corporate capacity conferred upon a community for the purpose of enabling it to enter into a contract cannot be withdrawn until the contract is satisfied.

The argument thus advanced does not deny to a State the power to control and change its civil institutions, created for local governmental purposes. It goes only to the extent that powers and capacities conferred upon a community for the purpose of enabling it to enter into private contracts and of providing a remedy thereon, are not liable to be destroyed by any act of the State, unless provision be made for the discharge of the contracts thus authorized. No State can do any act impairing the obligation of a contract. Statehood, however proud and supreme, must yield perforce to this rule of honesty and fair dealing, embodied forever into our fundamental law. The State, in the first instance, was not bound to tender to the public this contract nor to stipulate that the corporations created for the sole purpose of the contract should be liable to suit thereon, nor to provide that they should have the remedy of taxation; but having voluntarily done so, the State cannot repudiate the liabilities thus created, nor lay aside the obligation of the contract as it would an old cloak.

Those cases, then, which hold that a State has the power to dissolve the regular municipal corporations created by it, notwithstanding that this may result in leaving the corporate creditors without a remedy, have little application to the present case. In those cases, the continuance of corporate existence was no part of the contract made by the State with corporate creditors. But those persons extending credit knew that corporate life was conferred for local governmental purposes, and was

liable to be recalled when deemed expedient. There the dissolution of the municipality, although it leave the creditors remediless, would not impair the obligation of the contract, for the contract itself contemplated the possibility of this result.

As a deduction necessarily following from the established principles, we submit that : If a State, in authorizing a municipal indebtedness, should stipulate that so long as the debt be outstanding, the community should be liable as an entity to suit thereon, this stipulation would be protected by the Federal Constitution, and the capacity of being sued thus contracted for would survive the destruction of all other corporate powers. In the present case, it is clearly implied the capacity of being sued, created as it was merely for the purpose of furnishing a remedy upon the bonds, should continue so long as it might be necessary to such remedy. The State is thus bound by its own voluntary contract. A contrary view would leave the bondholders "in a condition in which their rights live but in grace and their remedy in entreaty only."

Assuming that the Township Capacity of Being Sued Has Been Destroyed, Does This Prevent the Court from Setting in Motion the Machinery Provided by the Statute for the Collection of the Tax?

The answer to this question must depend upon whether the collection of the tax is made dependent upon the continued township corporate life. If not so dependent, then there is no reason why the dissolution of the township should impair the operation of the taxing machinery.

The act of 1882 (amended by the act of 1885) did not charge the duty of assessing and collecting taxes for the payment of the bonds upon township officers, but devolved this duty upon the County Auditor and County Treasurer respectively. These offices existed before and independently of the statute of 1882 and 1885. If the power of taxation is vested in the municipality itself or in its own corporate agents, its dissolution, involving the destruction of the only means for levying and collecting taxes, might leave the bondholders without a remedy, and in such case there would be no one against whom mandamus could issue. But if the ordinary structure or agency by which the taxes are to be levied and collected be independent of the debtor municipality; if the power be lodged in other officials, then there is no reason why the dissolution of the municipality

should involve the destruction of the taxing machinery or prevent the exercise of this power. In the present case, the power of levying and collecting the tax was conferred, not upon the township, nor yet upon township officials. It was vested in the County Auditor and the County Treasurer. This was the machinery designated by the statute for the assessment and collection of taxes to pay the township bonds. This machinery is not destroyed or affected by the passage of the constitutional amendment.

The theory of the plaintiff in error seems to be that mandamus is in the nature of an action or suit, and will abate with the dissolution of the township. This is not the case. Before the township was dissolved the action had ripened into a judgment. Mandamus, like execution, can issue after the death of the judgment debtor. An action or an original proceeding may be abated by death, but mandamus is not an original proceeding, but is ancillary, and bears the same relation to the judgment that an execution does.

The mandamus "becomes a substitute for the ordinary process of execution to enforce the payment of the same."

Riggs vs. Johnson County, 6 Wall., 166.

"When issued in such a case, it becomes a substitute for the ordinary process of execution to enforce the judgment."

Weber vs. Lee County, 6 Wallace, 210.

The writ performs the office and is the legal equivalent of an execution against an individual.

Lafayette County vs. Wonderly, 34 C. C. A., 360.
McCullough vs. Hicks, 63 S. C., 542.

This is in no sense a proceeding against the township, but it is brought against county officers to compel them to discharge a plain statutory duty. The township in its corporate capacity is neither a necessary nor a proper party. All issues between the township and the bondholders were settled by the judgment. In the question now presented, to wit: whether the County Auditor and Treasurer are charged with the duty of assessing and collecting a tax to pay the judgment, the township in its corporate capacity has no voice, either to consent or object.

Why should the dissolution of the township abate a proceeding to which it is neither a necessary nor proper party?

The original act of 1882, which authorized the issue of bonds and directed the County Auditor to assess and the County Treasurer to collect taxes for their payment, did not incorporate the townships. It is manifest therefore that the Legislature did not, in the first instance, regard township corporate existence as necessary to the exercise of the taxing power. The townships were incorporated by the amendatory act of 1885. Their dissolution would only restore the status created by the act of 1882.

There is a long line of cases decided by this Court upholding the enforceability of bonds issued under acts identical with that of 1882, providing for the issue of township bonds and for their payment by taxes to be levied and collected by county officials, without making any provision, however, for the incorporation of the townships. The Court held in these cases that the bondholders could sue the county and recover a nominal judgment establishing the debt, to be satisfied by township taxes and enforced, if need be, by mandamus against the county officers charged with the duty of assessing and collecting the tax.

Jordan vs. Cass Co., 3 Dill. 185.
Cass Co. vs. Johnston, 95 U. S. 360.
Cass Co. vs. Jordan, 95 U. S., 373.
Davenport vs. Dodge Co., 105 U. S. 237.
U. S. vs. Dodge Co., 110 U. S. 162.
Blair vs. Cuming Co., 111 U. S. 367.
Nemaha Co. vs. Frank, 120 U. S. 46.

These cases clearly establish the doctrine that where the duty of assessing and collecting a township tax to pay a township obligation is charged upon the county officers, corporate capacity in the township is not essential to the enforcement of such duty.

The only remaining question is whether the provision for the levy and collection of a tax to pay these bonds has been repealed.

The doctrine is firmly established that where a statute authorizing municipal bonds provides for an annual tax for their payment, it is beyond the power of the State to repeal such provision until the bonds are paid.

In U. S. vs. Quincy, the Court said:

"Where a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements the power thus given cannot be withdrawn until the contract is satisfied. The State and the corporation in such cases are equally bound. The power given becomes a trust which the donor cannot annul."

4 Wall. 451.
City of Galona vs. Amy 72 U. S. 705.
Merriwether vs. Garrett, 102 U. S. 205.

Other authorities along this line are as follows:

Seibert vs. Lewis, 122 U. S. 294;
Scotland County vs. U. S., 140 U. S. 41;
Hicks vs. Cleveland, 45 C. C. A., 429.

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